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## NOTES.

WITH this number the LAW QUARTERLY REVIEW completes its tenth volume. It has been thought right, for the convenience of subscribers and others who may wish to refer to back volumes, to issue a complete index of contributors, subjects of articles, and books reviewed, on the same plan which was applied by the late Mr. G. Croom Robertson to the general index to the first ten volumes, and afterwards the whole first series, of *Mind*. This makes it needless to publish a separate index to this volume. We do not think it necessary to take a formal survey of our past work on this occasion; but we must express our thanks to the learned contributors who have enabled this REVIEW to do justice to both scientific and practical topics of legal interest within almost a larger range than we hoped for at first. Having counted among our contributors the late Sir James Stephen, the late Lord Bowen, Lord Justice Lindley, Sir Edward Fry, Lord Davey, Mr. Justice Wright, Judge Chalmers, and Judge Holmes of Massachusetts, such representatives of special branches of learning and applied legal science as Sir Howard Elphinstone, Mr. Challis, and Mr. Ilbert, and in the political and historical borderlands of law such helpers as Sir Alfred Lyall, Mr. Vinogradoff, Mr. J. H. Round, and Freeman, for too short a time the Editor's colleague at Oxford, we should indeed be unreasonable if we were not more than satisfied with the quality of the support we have received. We have the satisfaction of believing that the encouragement of our example had something to do with the foundation of the *Harvard Law Review*, in whose pages have appeared some of the most important additions lately made to our historical knowledge of the Common Law. As for the quantity of interest shown either here or in America in the study of law as a science, there is perhaps room for increase. But let us be thankful for what there is.

F. P.

Where a judge merely follows a reported case his decision adds little, if anything, to the authority of the case, but where he independently arrives at the same conclusion as that reported, the result is very different. An example will make this clear. For simplicity, I will suppose that eighty per cent. of the decisions of each judge are correct. It follows that out of 100 decisions given by *A*, 80 are correct, 20 incorrect. When *B* has the same points before him as *A*, he will decide correctly, and therefore agree with *A* in eighty per cent. of the 80 cases that *A* decided correctly, i.e. in 64 cases; while he will decide incorrectly, and therefore agree with *A* in twenty per cent. of the 20 cases that *A* decided incorrectly, i.e. in 4 cases. The result being that the decisions of *A* and *B* are correct in 64 out of the 68 cases, i.e. 16 out of 17, or about ninety-four per cent. of the cases, in which they agree. H. W. E.

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The headnotes of three consecutive House of Lords cases in the Law Reports—*Hamlyn & Co.* v. *Talisker Distillery*, '94, A. C. 202; *Richardson, Spence & Co.* v. *Rowntree*, *ib.* 217; *Hedley* v. *Pinkney & Sons S. S. Co.*, *ib.* 222—exemplify in various degrees all the faults of which we have repeatedly complained, and do not give any sign of improvement. *Hedley's* case is the worst treated, but in none of them is any substantial help given to the reader for ascertaining the real point of the decision.

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On the other hand, *Brisbane* (Municipal Council of) v. *Martin*, '94, A. C. 249, applied to a case from Queensland, in Lord Ashbourne's words, 'the settled rule' (as to setting aside the verdict of a jury) 'which has prevailed for a number of years in this country.' It may be good to report such a case in Queensland if the Courts of that colony have not learnt elementary law. There is no reason for reporting it here.

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From the judgments in *Hamlyn* v. *Talisker Distillery*, '94, A. C. 202, 6 R. July, 14, the following propositions may be, with more or less certainty, deduced.

First: When a contract is entered into between parties residing in different countries, as for example England and Scotland, where different systems of law prevail, the legal effect of the contract is to be determined by reference to that law, whether English or Scotch, which the parties intended to govern the whole, or it may be a part of the contract.

Secondly: There is no necessity for a contract being governed

wholly by the law of one country. There is nothing, speaking generally, to prevent persons who are entering into an agreement making it part of the terms that as to certain matters the agreement shall be governed by the law of England, and as to certain other matters by the law of Scotland.

Thirdly: The validity and even the legality of a term in a contract often does in fact depend on the will of the parties. This assertion sounds paradoxical and disputable, but if properly understood it is incontrovertible. Persons who enter into a contract under the law of England cannot, it will be said, at their own choice validate agreements which under English law are voidable or void. This is true. But it is also true that the parties to a contract can within certain limits determine what is the law by which their agreement is governed, and therefore can in effect determine whether it be valid or not. The contract dealt with in *Hamlyn* v. *Talisker Distillery* contained an arbitration clause which certainly was invalid under the law of Scotland, and it is perfectly clear that if not the whole yet certainly the greater part of the contract was to be performed in Scotland, but the parties while contracting mainly with a view to the law of Scotland agreed that the arbitration clause should in effect be made subject to the law of England, under which law it was perfectly valid. They therefore in effect determined that the arbitration clause, which is not opposed to any rule of English law, should be valid.

Fourthly: No country can be called upon to enforce rights, the enforcement of which is opposed to the policy by which is meant the broad fundamental principles of the law of that country.

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None of the principles established or confirmed by *Hamlyn* v. *Talisker Distillery*, '94, A.C. 202, 6 R. July, 14, are new. They are well known to every person versed in English decisions as to the conflict of laws. But their authority is greatly strengthened by their being definitely propounded in a case decided by the House of Lords. The utterances of their lordships moreover form an admirable example of that kind of judicial exposition in which English lawyers, when taken at their best, excel. There is nothing more curious and from one point of view more important than the contrast between the marvellous ability with which English judges apply and expound the general principles necessary for the decision of a given case, and the equally astonishing narrowness with which they often interpret statutory enactments. The main reason for dreading codification is the fear that our judges should decline to treat a code as a body of principles and look upon

it as they generally do upon a statute, as a series of rules which admit only of the strictest verbal interpretation.

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How far is a passenger travelling by a railway or on board a steamboat bound by conditions written on or referred to by his ticket when he has in fact never read them? The decision of the House of Lords in *Richardson &c.* v. *Rowntree*, '94, A. C. 217, gives at least a partial, and as far as it goes a satisfactory reply to this question. A traveller is not bound by conditions which, when he takes a ticket, he does not know to exist and to which his attention is not directed by the company in a reasonably sufficient manner. When we allow for the tendency of juries to sympathize with every traveller who has suffered damage in person or property through the real or supposed negligence of a company, we may perhaps assume that the doctrine laid down in *Richardson* v. *Rowntree* will protect travellers by land or sea from any gross injustice. Still it must be admitted that the power of companies and other carriers to exempt themselves from liability for negligence often leads to unsatisfactory results and is not based on any very clear principle. It is almost idle to treat the matter as one of contract. A passenger when going on board a steamship never really knows the terms of the contract into which he is supposed to enter. More than this, he is not in a position, if he knew and had read every condition printed on or referred to by his ticket, to bargain with the steamship company. No man probably will be found who has declined to take a ticket, say for a passage from London to Boulogne, because when he received it he discovered that the conditions were too favourable to the company whose steamer he was entering. Perhaps it would be better if the legislature set aside in these cases all reference to contract, enacted specifically what should be the liability of carriers, and prohibited so-called contracts by which statutory liabilities were evaded.

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The actual decision of the House of Lords in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, '94, A. C. 318, 6 R. Aug. 39, that the rule or supposed rule in *Merryweather* v. *Nixan*, 8 T. R. 186, 16 R. R. 810 as to contribution between wrongdoers does not in any case apply to Scotland, has not much interest in itself for lawyers south of the Tweed. But the remarks made on *Merryweather* v. *Nixan*, especially by Lord Herschell (see '94, A. C. at p. 324, 6 R. Aug. 43), leave it pretty clear that in England the true rule is, as was laid down by Best C.J. in *Adamson* v. *Jarvis*, 4 Bing. 66, that contribution between wrongdoers is

excluded only in 'cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.'

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In *Arrow S. S. Co.* v. *Tyne Commissioners*, 6 R. Sept. 1, the House of Lords grazed, so to speak, the high, grave, and dubious question whether a man can by the common law so fully disclaim and abandon his own goods that they cease, by the mere declaration of his will, coupled or not coupled with a physical act equivalent to jettison, to be in any sense his property. We humbly conceive the true doctrine to be that possession of goods is never absolutely vacant in law, and that an express abandonment is, in point of law, merely a licence to the first man who will to take the goods for his own; which taking will be justified and will finally change the property if complete before the taker has notice that the licence is revoked. Compare the authorities as to gifts without delivery discussed in L. Q. R. vi. 446. Whether this doctrine (statutes apart) would apply to a ship on the high seas is another matter. In itself we believe it to be as rational as any other doctrine.

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The law as to reduction of a company's capital illustrates the anomalous mode in which our law is made. The Companies Act says nothing about such reduction. Then a special Act is passed, the Companies Act, 1867, dealing with it. This Act receives a construction from an eminent commercial judge, Jessel M.R., which makes it a dead letter. So the Companies Act, 1877, is passed to resuscitate, explain and amplify the prior Act. This begets fresh judicial difficulties, and now after 32 years of confusion and contradiction, we have the House of Lords reversing the Court of Appeal (*British and American Trustee Corporation* v. *Cowper* (42 W. R. 652)), on the elementary question whether a company can reduce its capital by buying in its own shares. As a general proposition it is quite well settled that a limited company cannot apply its funds in this manner. It would be an easy way of making the company's capital a mere sham. The fallacy which the Law Lords have just exposed lay in supposing that because a company cannot buy its own shares, and so reduce its capital, it cannot on reducing its capital in the authorized way adopt as a mode of reduction the buying up of its own shares. Present creditors are safeguarded by the machinery for reduction, and for the future the company starts trading afresh with its reduced capital duly advertised. Lord Macnaghten's words disapproving of *Hutton* v. *Scarborough Hotel Co.* (No. 2) (2 Dr. & Sm. 514, 521) deserve by the way careful attention.

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Three citizens of Sydney out of four (to which number the scarcity of white labour seems to have brought Australian juries) were of opinion that the term 'Evening Ananias' was a mere playful reference by a Sydney evening paper to a contemporary, and could not be reasonably understood as imputing wilful and habitual falsehood to the manager of the paper so designated. The Lords of the Council were of opinion (*Australian Newspaper Co.* v. *Bennett*, 6 R. Sept. 36) that this finding was within the legitimate province of a jury. Perhaps there is not much law in the case: but it is a fresh example of the unwisdom of bringing speculative libel actions upon words of mere chaff or banter. Courts of law are not tribunals of literary taste.

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When the defence of communication on a privileged occasion is set up in an action for libel, the question is whether there was a privileged occasion at the time and place of publishing the words complained of, not what were the circumstances at the time and place of the original writing. Those who make statements of a defamatory nature with the honest purpose of furthering some lawful public or private interest must see at their peril (in case the statements cannot be absolutely justified) that they do not communicate them to some one who is a stranger to the occasion. So the Court of Appeal has held in *Hebditch* v. *MacIlwaine*, '94, 2 Q. B. 54, 9 R. July, 204, expressly overruling *Tompson* v. *Dashwood*, 11 Q. B. D. 43, 52 L. J. Q. B. 425, which, as we said three years ago, we have always thought wrong.

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Can an ambassador accredited to the Crown give our Courts jurisdiction over him by submission?

This question resolves itself into two inquiries, to neither of which is it so easy as might be expected to give a decided answer.

First: Can an ambassador give our Courts jurisdiction to entertain an action against him by appearing without protest?

It is natural to answer this question in the affirmative. English judges have certainly intimated that a sovereign can submit to the jurisdiction of an English Court (see *Taylor* v. *Best*, 23 L. J. C. P. 89, 93, expressions of Maule J., and *Mighell* v. *Sultan of Johore*, '94, 1 Q. B. (C. A.) 149, 159, 9 R. July, 199, 202, judgment of Esher M. R., where Lord Esher's expressions certainly refer to submission by appearance in an action). And if a sovereign can thus submit to the jurisdiction of the Court, the natural inference is that his representative can do so also; and this view is certainly confirmed by *Taylor* v. *Best*, 14 C. B. 487, 522, 523, judgment of Jarvis C. J. Yet the conclusion that an ambassador can thus

waive his privilege is open to grave doubt. 7 Anne, c. 12, s. 3, as interpreted by the *Magdalena Steam Navigation Co. Case*, 2 E. & E. 94, makes the service of a writ on any ambassador or public minister 'utterly null and void.' The result would seem to follow that no action can be entertained against him; and this is certainly the conclusion which is suggested, if not positively laid down, by *Musurus Bey* v. *Gadban*, '94, 2 Q. B. (C. A.) 352, 9 R. Aug. 243. Nor is there really any inconsistency in the doctrine that in some respects the privileges of an ambassador may, at any rate under 7 Anne, c. 12, be wider than those of the sovereign whom he represents.

Secondly: Have our Courts jurisdiction to entertain a counter-claim against an ambassador who himself appears in them as plaintiff?

With the answer to this question the statute of Anne has, it is submitted, no concern. The reply to it must depend on general principles. It is certain, on the one hand, that any one who brings an action in a Court, submits, as regards that action, to the jurisdiction of the Court. It is clear, on the other hand, that even independently of the statute of Anne, an ambassador is not liable to have an action brought against him, and that a counter-claim is, or may be, nothing more than a cross action. The conclusion from these premises ought to be, it is submitted, that the jurisdiction of the Court to entertain a counter-claim against an ambassador depends on the nature of the counter-claim. If the counter-claim is in reality a defence to the action, if it in substance shows that the defendant is under no liability to the plaintiff, then it can be entertained, for the ambassador who appears in Court, certainly as regards the particular action, submits to the procedure of the Court. If, on the other hand, the counter-claim is in reality a cross action, then, it is submitted, the Court has no jurisdiction to entertain it. If this conclusion be correct, it may be stated in a concrete form as follows: *A*, an ambassador accredited to the Crown, sues *X* for a debt of £100. *X* pleads a set-off of £100 due from *A* to *X*, and the original debt and the set-off are really the results of one business transaction between *A* and *X*. This set-off, or counter-claim, can be entertained. *X* pleads, not a set-off but a counter-claim in the strictest sense of the term, that is to say he answers *A*'s demand by a counter-claim for damages in respect of some wrong done by *A* to *X*. Such a counter-claim cannot, it is submitted, be rightly entertained.

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The 'living picture' cases, *Hanfstaengl* v. *Empire Palace* (no. 2), 7 R. Aug. 80, *Hanfstaengl* v. *Empire Palace* (no. 1), '94, 2 Ch. 1, 7 R. Sept. 84 (both in C. A.), make a good example of the true principles of copyright law. Copyright is not a property in ideas conferred by

the law of nature, as certain philosophers have vainly talked, but a monopoly specially created by law on grounds of public utility, and a monopoly not in ideas or artistic motives in the abstract, but in particular forms of expression. Therefore copyright in a work of literature or art can be infringed only by a reproduction *ejusdem generis*, a picture by something pictorial, and so forth. It does not follow, however, that infringement might not be indirectly committed by reconstruction of the original design from something which was not itself an infringement, even if the reconstructor had no direct acquaintance with the original; it was expressly allowed by the Court of Appeal that it could be so, though they held that in the particular case it was not. The questions of dramatizing literary work and of 'performing rights' are not touched by these decisions, and stand on a special footing.

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*Helby* v. *Matthews*, '94, 2 Q.B. (C.A.) 262, is a case of some practical importance. It determines that the now common 'hire and purchase' agreement of goods—in the particular instance of a piano—is in reality from the beginning not a 'hiring' but a conditional sale of the goods. The consequence follows that the so-called hirer can under the Factors Act, 1889, at once pledge or sell a piano obtained on the hire and purchase system to any purchaser who takes it bona fide without notice of the right of the original seller, and the pledgee or buyer obtains a good title to the piano against the original owner. We do not know that there is any reason for quarrelling with the judgment of the Court of Appeal in *Helby* v. *Matthews*. Logically it is defensible. The hire and purchase system must involve either a hiring or a sale, and when carefully analyzed, it appears to be a conditional contract for the sale of goods. Nor is it reasonable to object that the original owner of the piano is hardly treated. Either *A* who sells, or *X* to whom the piano is ultimately sold by the hirer, must suffer from the hirer's fraud, and on grounds of justice and expediency it appears at least as fair that *A* should suffer as *X*. It is nevertheless probable that the principle established by *Helby* v. *Matthews*, if it ultimately be upheld, will make piano makers fight rather shy of the popular hire and purchase system. In *Shenstone* v. *Hilton*, 10 R. Sept. 311, Bruce J. followed this decision and extended it for the protection of an auctioneer, holding that not only delivery to a purchaser or the like under a contract to which he is a party, but delivery to an auctioneer for sale on the possessor's account, is a disposition or agreement for disposition of the goods within s. 9 of the Act.

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*Clements* v. *L. & N. W. Ry. Co.*, '94, 2 Q. B. 482, C. A. is a decision of great interest (for so long as the Employers' Liability Act stands in its present form) to the company concerned, and all other employers who have established insurance funds on the 'contracting out' system. But perhaps there is more general and more permanent interest in the refusal of the Court of Appeal to limit by reference to particular classes of contracts the power of the Court to say that a contract made by an infant is binding on him as being on the whole for his benefit. The case also finally settles (if any more authority were needed) that a contract is for an infant's benefit if it appears advantageous to him when taken as a whole, and that the existence of qualifying or restrictive provisions which leave a balance of benefit does not deprive it of that character.

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Lord Westbury once wished that there were no cases, and *In re Clark, Ex parte Beardmore* (9 R. July, 249), a contest between the trustee under a first bankruptcy and a trustee under a second bankruptcy, serves to illustrate his point of view. The Bankruptcy Act is clear. It says plainly enough (s. 44 (2) (i)) that after-acquired property is to vest in the trustee, i. e. the first trustee, but then to perplex the question comes *Cohen* v. *Mitchell* (25 Q. B. D. 262), laying down the considered proposition, that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. This doctrine of *Cohen* v. *Mitchell* is an equitable graft on the Act illustrating Aristotle's definition of equity as a rectification of the law where it fails from generality, but like other engrafted equitable doctrines, it must be in furtherance, not in derogation of the common or statute law which it amends. The substance of *In re Clark* is that a trustee in bankruptcy is not a purchaser for value, and therefore not within *Cohen* v. *Mitchell*. It was a plausible argument to say that the credit given by the creditors under the second bankruptcy has gone to manufacture the after-acquired property. The answer is, you ought not to give credit to an undischarged bankrupt. In speculations like these we are quitting the plain words of the *lex scripta* and disregarding general principles in the endeavour to do what Lord Bramwell called 'fanciful' justice in particular cases.

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Chitty J. has held *in re Budgett*, '94, 2 Ch. 557, that the curious little exceptions to the rule of distributing joint and separate estates in bankruptcy were not (as many learned persons had

supposed) abrogated by the Act of 1883. If this result is contrary to the intention of the Act, it can easily be set right. But we have some difficulty in following one of the reasons given. Lord Herschell's well-known remarks in the *Vagliano* case on the interpretation of a codifying Act are held not to apply to the Bankruptcy Act, 1883, because it is not a codifying Act, but an Act to amend and consolidate the law. To codify, surely, is to consolidate, and to consolidate is almost always to amend, more or less. The common form in the preambles of the Anglo-Indian Codes is 'define and amend.'

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When Lord Hermand, the Scotch Judge, was embarrassed with a statute, he used to say 'in his snorting and contemptuous way,' so Lord Cockburn tells us, 'But then we were told that there is a statute against all this. A statute! What is a statute? Words —mere words. No, my Lairds, I go by the law of right reason.' The Court in *Reg.* v. *Judge Snagge* (70 L. T. 874) must have adopted some such heroic method as this if it wanted to get rid of section 72 of the County Court Act, 1888. No doubt it is a matter of great moment to solicitors whether managing clerks are or are not entitled to audience in a County Court. The denial of such audience means that large firms must give up their County Court business practice altogether, for it will hardly be worth the principals' while to attend to such matters. Granting, however,—what it would be impossible to deny—that managing clerks are fully competent—a highly intelligent and capable set of men—the words of the Act are plain, and the policy of the Act is plain. That policy is, as Lord Cairns expressed it in *Ex parte Broadhouse* (L. R. 2 Ch. 655), not only that the Court should have before it a person who is under an obligation to it as one of its officers, but a person who is also under an obligation to the suitor because he is in privity with him, and actually represents him. *Reg.* v. *Snagge* may not be an unqualified misfortune, if it distributes County Court business among those solicitors who can give a personal attention to it.

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'I always consider it a defect in a speech,' said Douglas Jerrold, 'when you can't understand what it means.' It is just as desirable that conveyancers' phrases should be intelligible and precise. 'As if she had died without having been married,' for instance, the ordinary words in an ultimate trust of the wife's property in a marriage settlement, what do they mean? Do they exclude children or not? Knight Bruce and Turner L.JJ. (*Wilson* v. *Atkinson*, 4 D. J. & S. 455) and Stirling J. (*In re Arden's Trusts*, W. N. 1890, 204)

thought they did not. Jessel M.R. (*Emmins* v. *Bradford*, 13 Ch. D. 493) thought they did. At the first blush of the thing it is difficult to see how a wife, who dies 'without having been married,' can have children in contemplation of law. But this is just a case for not 'sticking in the bark'; but for looking at the general intent and scheme of a marriage settlement, and so looking at it, the obvious intent, though clumsily expressed, is to exclude the husband only, even though there is not the usual trust for children earlier in the settlement. After Chitty J.'s decision in *Stoddart* v. *Savile* (8 R. August, 150), we may fairly hope the form is finally settled. Another question which would also have been 'nuts' to the Schoolmen was that raised in *In re Shaw, Robinson* v. *Shaw* (8 R. August, 208), whether an illegitimate child *en ventre sa mère* can acquire the reputation of legitimacy. A child *en ventre sa mère* can do many wonderful things, we know, but not this.

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The old doctrine of unity between husband and wife is in a dilapidated, not to say ruinous condition, but it still affords good cover for a married woman who wishes to exercise her immemorial privilege of changing her mind. A male infant who executes a marriage settlement and covenants to bring in after-acquired property, must make up his mind to affirm or disaffirm within a reasonable time. So must a lady infant; but an infant wife is a more complex and more elusive persona. The daring proposition advanced on behalf of the ex-infant wife in *In re Holford* (7 R. August, 64), was that a married woman is incapable either with or without the concurrence of her husband of affirming her covenant made while an infant. This attempt to stultify herself did not commend itself to the Court. A married woman may have capacity to elect, though she has none to contract. She is quick enough to exercise a mature discretion when she sees her way to the benefits of independence; when, for instance, it is a case of taking possession of settled property as equitable tenant for life and managing it for herself, *In re Newen* (8 R. July, 129).

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*Ponting* v. *Noakes*, '94, 2 Q.B. 281, 10 R. July, 283, is one more in the series of cases which show that the rule in *Fletcher* v. *Rylands*, L. R. 3 H. L. 330, is too severe a rule to be extended beyond the terms in which it was laid down. A man is answerable for any noxious or dangerous thing which he may have on his land, to the extent of keeping it within his own bounds 'that it may not trespass,' as one old book says. He is not bound to keep it out of reach of his neighbour or his neighbour's beasts if

they come to it by their own trespass. In this case the noxious thing was a yew-tree growing on the defendant's land near the plaintiff's field, but not encroaching on it. The plaintiff's horse put his head across the boundary, ate of the yew-leaves, and died. He could get at the poison only by trespass, though a small trespass. If the defendant had been bound by contract or special custom to fence against his neighbour's cattle, he would have been liable for the natural consequence of omitting the special duty. No such duty being imposed on him, he was under no duty at all in the matter.

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A by-law of a borough imposes a penalty on any person making a noise in the streets to the 'annoyance of the inhabitants.' A newspaper boy shouts out the name of a newspaper incessantly for six minutes to the annoyance of *A*. The magistrates hold that since only one inhabitant of the borough was annoyed, the boy could not be convicted of an offence against the by-law. The Queen's Bench Division has set them right and has laid down that if the act complained of is of such a character as to be likely to annoy the inhabitants generally, it is not the less an offence under the by-law because only one of the inhabitants is in fact annoyed. *Innes* v. *Newman*, '94, 2 Q. B. 292, 10 R. Sept. 269. This is good sense and good law, and most satisfactory to all who hold that the inhabitants of towns have a right to be protected from the nuisance of gratuitous noise.

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The alleged alarming increase of lunacy seems reflected in the number of reported cases in which lunatics figure. *In re Martha Bagge* (63 L. J. Ch. 613) may be usefully contrasted with *In re X.* ('94, 2 Ch. (C. A.) 415) as to powers of sale by lunatic tenants for life under the Settled Land Act and otherwise; but the case which will appeal most to the imaginations of business men in general is that of a lunatic partner at large, signing cheques at random in the firm's name. If this were a wrong without a remedy it would be a grievance of the first magnitude, but Stirling J. found the principles of equity elastic enough to meet the case. It is rather beside the mark to say that an injunction ought not to be granted against a lunatic because he cannot be contumacious. What the Court is concerned with is his acts not his mind, and if his mind runs away with him as the late Lord Stuart's legs did with him, the kindest thing is to protect him against himself. 'Lunacy,' as Lord Bramwell said, 'is not a privilege, but a misfortune.' In illustration of the last remark, *In re Winkle* (7 R. July, 91) may be

cited: the Court will not allow an execution creditor to strip a lunatic of all his property and turn him into a pauper lunatic asylum, but it will not go further and provide for the maintenance of the lunatic's wife as well as his own out of the lunatic's property at the expense of creditors.

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*In re Bird, Bird* v. *Cross* (8 R. July, 150) it was a question of the effect of lunacy on a condition—a condition subsequent that the legatee should return to England within three years. Lunacy had at the date of the testator's death overtaken the legatee, and had it been lunacy pure and simple, the Court would have had no difficulty in treating the condition as one impossible of fulfilment by the act of God, but the lunatic complicated matters by having lucid intervals from time to time during which he might have performed the condition. But really lunacy is a state so disturbing to the ordinary tenour of existence, that a lucid interval or two is not enough to restore equanimity. *In re Stratheden* (8 R. July, 175) was a more unfortunate case of condition. It is satisfactory to know that our law takes the generous view that a bequest to a volunteer corps is a gift to a charity, but in the particular instance this generous appreciation of the volunteer movement reads rather too like one of Joseph Surface's 'Noble sentiments.' The appointment of another Lieutenant-Colonel—the condition in question—might, of course, never take place within the limits of time prescribed by the rules against perpetuities. As a matter of probability we may think it would, but the law cannot listen to probabilities.

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A correspondent at New Westminster, British Columbia, writes as follows:—'The report of the Highwayman's case (*Everet* v. *Williams*) in the issue of the LAW QUARTERLY REVIEW of July, 1893, was both interesting and amusing. It seemed almost beyond belief that such a case could ever have been instituted in an English Court of Justice. I was also surprised to find an almost parallel case brought in this age in the Courts of the State of Washington, our neighbour on the south. The enclosed clipping which speaks for itself, and may not be without interest to you, is taken from the *Daily Post Intelligencer*, a newspaper published in the City of Seattle, the largest city (population 60,000) in the State. The action was brought in the Superior Court, a Court of general jurisdiction and the highest Court in the State for the trial of actions, the Supreme Court being merely a Court of Appeal. I might also remark, though perhaps it is needless, that running a gambling house is a criminal offence under the laws of

the State.' The extract has the businesslike head-line, 'Partners in Gambling can swindle each other at will,' and the first paragraph opens as follows:—'Judge Humes yesterday ruled that courts were not intended to protect partners in gambling from cheating each other'—and the suit before him was therefore dismissed. The suit was in effect for an account of the profits of a gambling house, and the plaintiff alleged embezzlement. The body of the report is in a sporting Western dialect, and mixes up the internal and the external frauds of the game (the latter were of course irrelevant as between the partners). We think it would be obscure to the majority of British readers, and are unable in vacation time to find a qualified commentator.

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The evidence taken by the Gresham University Commission was published soon after the issue of our last number. Many witnesses, not only teachers of law but judges and leaders of the profession, were examined on the relation of legal studies to university education. In the result there was practical unanimity of opinion that the Inns of Court and the Incorporated Law Society might and ought to be intimately associated with the Faculty of Law in the new teaching University of London, and that there would be no difficulty in providing for this without prejudice to the existing rights of controlling the admission of students as practising barristers and solicitors. Immediate action on the report can hardly be expected in the present state of public affairs, but it is only a question of time. Will the Benchers, or the Council of the Incorporated Law Society, be wise enough to come forward while they have time to do it with a good grace? Whichever body does so first will considerably improve its position before the public.

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We owe Judge Dillon and his printers an apology. In our July number (p. 278) we treated 'base *Judean*,' as quoted from the last scene of Othello, as a misprint. We still believe that *Indian* is the true reading and that *Judean* was a misprint: but it is no new one, for it is the reading of the first folio and has been supported by a respectable minority of modern Shakespeare critics. The allusion is obscure in any case.

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*It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.*

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## CHOSES IN ACTION.

THE question raised by Sir Howard Elphinstone in a recent number of this REVIEW[1], is not an easy one to answer, for the learning on the subject has grown up in the irregular way characteristic of English law, and until within the last few years it has been treated by our text-writers rather as an incident to some other branch of law than as a subject by itself.

If 'chose in action' properly means nothing more than money or property which a person is entitled to recover by bringing an action, the extension of the term to such kinds of property as shares, stocks, patents, copyrights, &c., and to debts payable *in futuro*, is undoubtedly inaccurate. A share in a company is an interest in a certain property or undertaking; it gives a right to participate in the management, profits, and assets of the company[2], but it need not, and in the majority of cases never does, give rise to any right of action against the company to recover what the share represents. If I hold a £100 share, fully paid up, in a company, I have, as a rule, no right to take proceedings against the company to recover the £100. The company may never declare a dividend[3], and although I may object to this course, I have no remedy by action. It is true that if the company does declare a dividend, I have a right of action to obtain payment of my proportion, but that is a separate chose in action[4], which may be converted into a chose in possession by payment of the money; my rights in respect of the share itself continue as before. Still less is stock in the public funds a chose in action in the narrow sense of the term: no action lies to recover the interest if default is made by the government, while the principal is a purely fictitious amount; it is merely a cipher by which the interest is computed[5]. Again, a patent, copyright or trademark is a kind of property which, as Sir H. Elphinstone has pointed out, is essentially negative; it may never give rise to a right of action. As regards debts payable at a future time, although it has long been settled that a certain debt

[1] 'What is a Chose in Action?' LAW QUARTERLY REVIEW, vol. ix. p. 311.

[2] See the argument in *Tempest* v. *Kilner* (1845), 2 C. B. at p. 307.

[3] This was one of the reasons given by Shadwell V.-C. to account for the old rule that trustees were bound to convert Bank stock: *Mills* v. *Mills* (1835), 7 Sim. 501.

[4] *Dalton* v. *Midland Counties Ry.* (1853), 13 C. B. 474.

[5] Stock in the public funds is not within a statute making persons having 'money out at interest' liable to be rated in respect of it for the relief of the poor: *Rex* v. *St. John Maddermarket* (1805), 6 East 182.

payable at a certain future time is a chose in action[1], it was not absolutely settled until 1878 that money payable in an uncertain event under a contract is a chose in action so as to be assignable at law under s. 25 of the Judicature Act, 1873[2].

Originally, no doubt, 'chose in action' meant a right of action and nothing more. So far as my limited researches go, the earliest case in which the phrase occurs is an action for maintenance in the Year Book 9 Hen. VI, 64, where one of the judges treated a claim to title-deeds as a chose in action[3]. It also occurs in 37 Hen. VI, 13, where the question arose whether an assignment of debts was a good consideration for a bond, the argument *contra* being that 'ẽ debtz ne fuȓ forsque chose en actiõ.' I have not come across any other instance of the use of the term 'chose in action' itself in the Year Books, but there are several equivalent phrases which throw light on the original meaning of the term. Thus in 13 Ed. III[4], in an action of account brought by three executors against one of themselves, to the argument that an executor could be made to account before the ordinary, it was replied: 'Jammes de chose qe feut en accion en la vie le testatour, fors qe de chose qest en lour pocessioun come executours, qar ceo qe feut en accioun en la vie le testatour ne touche testament ne matrimoigne.' So in 21 Ed. IV, 84, on a *scire facias* for an annuity, it is said: 'Cest annuity est personal, q̃ gist touts dits[5] en acẽ qĪ acẽ ne puit estȓ grãt, come d'un obl', l'acẽ de ẽ ne puit estȓ grãt ouster, ne l'acẽ sur le simple contract, nient plus cest añuity.' These passages show clearly, I think, that 'chose in action' originally meant merely a right to recover money or property by action. But the meaning of the term was soon extended so as to include rights analogous to rights of action, such as rights of entry, and finally to a number of miscellaneous rights which, being in the nature of what is now called incorporeal property, were naturally enough opposed to 'choses in possession,' and consequently included in 'choses in action.'

There is a title 'Chose en action & Chose en suspence' in Brooke's Abridgement, and the term 'chose en action' occurs in several of the placita, but these are for the most part free paraphrases of the original authorities. They are, however, of interest, in so far as they show what was considered a chose in action in Brooke's time. Most of the cases are grants of choses in action by or to the crown; these include an annuity, bond debts, goods forfeited, tithes, and

[1] Co. Litt. 292 b.

[2] *Brice* v. *Bannister*, 3 Q. B. D. 569; *Walker* v. *Bradford Bank*, 12 Q. B. D. 511.

[3] This and many other cases in the Year Books relating to the assignment of choses in action are cited in Pollock on Contract, App. F.

[4] Pike's edition; Record Pub. 1885.

[5] *Sic* in orig. Probably a misprint for 'touts foits.'

marriage of a ward. In this last case (pl. 11), where the crown granted a wardship, it is said: 'Le graunt puis est bon, car le roy poet grant chose in accion que est certeyn, ut hic et dett, mes nemy trespas, car ceo est incertayne.' Pl. 13 is the case of title deeds already mentioned (9 Hen. VI, 64): in this placitum occurs the expression: 'les charters sont choses in acciõ.' Under the same title Brooke also gives a note of a case in 33 Hen. VIII, arising on the statute 31 Hen. VIII for the suppression of monasteries. This Act vested in the king without office all rights, entries, actions, conditions, &c., belonging to the monasteries, and declared that he should be deemed in actual and real possession thereof. Some of the judges said: 'Uncore si abbe fuit disseisi de 4 acres de terre, le roy ne poet ceo graunt ouster devant entree fait per luy in ceo, pur ceo q̃ est chose in accion reall, et nyent semble al chose in accion personal ou mixt, come dett, garde & hujusmodi.' Others were of opinion that as to lands 'dont labbe navoit q̃ cause dentre ou droit in accion, de ceux le roy serra vest d'un titl' dentre and title daccion, mes le chose a qĩ il ad tiel cause dentre ou daccion nest pur ceo in luy in possession, et ideo ne poet passer del roy per generall parolx.' I quote this case in order to show that the distinction between choses in action real and choses in action personal existed as early as Henry VIII's reign.

There is no title 'Chose in action' in Fitzherbert's or Rolle's Abridgements, but there is a sub-title (G) *Choses en Action* under title 'Graunts' in Rolle's Abridgement, and the rule that 'chose en action nest grantable oustre,' is stated in the same title (sub-title F). It may be observed in passing that many of the sub-titles deal with questions of real property under the heading 'Chose': such as *Choses en Reputation*, *Choses de Trust*, *Quel Chose poet estre grant*, &c., &c.[1] It would hardly be necessary to point out that 'chose' is not equivalent to 'chattel personal,' were it not that Blackstone continually makes that mistake[2]. As a matter of fact the most important kind of choses in action in former days were choses in action real[3], as we shall presently observe.

In 11 Elizabeth the question was raised whether the grant of the next presentation to a church during an avoidance was good, and it was held by a majority of the court 'that the grant of the present avoidance is void, because it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the

[1] See especially sub-title (O) dealing with a 'chattell que est derive hors de un real chose et carry un interest de un reall chose,' as opposed to 'un personall chose come un chivall, que ne poet estre grant durant le vie grantee.'

[2] Not merely in omitting choses in action real from his definition of 'chose in action,' but in expressly treating 'chose' as equivalent to 'chattel personal' (Comm. ii. 434 seq.).

[3] See 10 Rep. 48 a.

vacancy; and also a thing in right, power and authority, and also a *chose in action*, and in effect the fruit and execution of the advowson, and not any advowson: and yet executors shall have it by privity of law[1].' This judgment is instructive in showing the way in which the term 'chose in action' gradually came to be applied to almost any right which cannot be granted over. The real reason why choses in action arising from contract were not assignable was, as Sir F. Pollock has pointed out[2], that they were rights of a personal nature. In the case of choses in action real, arising from disseisin, &c., this reason did not apply, because obviously no personal relation exists between disseisor and disseisee; the true reason why such choses in action were not assignable was that in the days when there was practically no Statute of Limitations, and the danger of maintenance was a real danger, 'terre-tenants' in peaceable possession ought not to be disturbed by persons who had bought up rights of entry and rights of action. A right of presentation to a church during a vacancy is not assignable, because the sale of such a right, which is an interest not of profit but of trust, would be contrary to public policy[3].

In *The Marquis of Winchester's* case[4] it was held that a mere right of action real was not affected by an Act forfeiting to the king all the lands, rights, conditions, and other hereditaments of a person who had been attainted of treason, 'for it would be very vexatious and inconvenient that estates of purchasers and others, after many descents and long possession, should be impeached at the king's suit, by such general words, against the reason and rule of the common law[5].'

In *Lampet's* case[6] 'was observed the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and

[1] *Stephens* v. *Wall* (1569), Dyer 283, pl. 29. Followed in *Brokesby's* case (1589), 1 Leo. 167; Cro. Eliz. 174.

[2] Pollock on Contract (5th edit. 206). Coke evidently felt that this was the true reason, for he says that a lord cannot take advantage of any obligation or covenant or other thing in action made to his villein, 'because they lye in privity and cannot be transferred to others' (Co. Litt. 117 a). He gives a somewhat similar reason in the case of a next presentation during the vacancy of an advowson (Co. Litt. 388 a). See also Mr. J. B. Ames's remarks, Harvard Law Review, iii. 339.

[3] See Mr. Hargrave's note to Co. Litt. 90, and the dictum of Lord Mansfield and Mr. Justice Wilmot in *Bishop of Lincoln* v. *Wolferstan* (Burr. 1512) 'that the true reason why a grant of a fallen presentation, or of an advowson after avoidance, is not good *quoad* the fallen vacancy, is the public utility and the better to guard against simony: not for the fictitious reason of its being then become a *chose in action*.'

[4] (1583) 3 Rep. 1.

[5] Compare *Ford and Sheldon's* case, 12 Rep. 1; *Case of Forfeiture by Treason*, 12 Rep. 6.

[6] (1603) 10 Rep. 48 a.

chiefly of terre-tenants, and the subversion of the due and equal execution of justice. . . . But all rights, titles and actions may by the wisdom and policy of the law be released to the terre-tenant, for the same reason of his repose and quiet, and for avoiding of contentions and suits, and that every one may live in his vocation in peace and plenty.'

Sheppard's Touchstone, which is supposed to have been written by a contemporary of Lord Coke, speaks of 'things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entry to any real or personal thing[1].' 'Things in action, and things of that nature, as causes of suit, rights and titles of entry. are not grantable over to strangers but in special cases[2].' 'A presentation to a church, after the church is become void, is not grantable, for it is in the nature of a thing in action[3].'

In Lord Coke's time, therefore, 'chose in action' had come to mean a good deal more than a mere right of action, and was almost equivalent to a right incapable of being assigned or granted over. Accordingly, when Coke is expounding the law relating to the right of presentation to an advowson during a vacancy, he gives as the reason why such a right may be exercised in certain cases by persons other than the owner, that 'albeit it be not grantable over, yet it is not meerly a chose in action . . . but otherwise it is of a bond, because that is meerly in action[4].' Again, a release of all actions releases a certain debt payable at a certain future time, 'for that the debt is a thing consisting meerely in action . . . albeit no action lyeth for the debt[5].' But such a release does not release rent or an annuity accruing due after the release, for the reason that the rent or annuity 'is not meerely in action, because it may be granted over[6].'

In the case of chattels real, Coke draws a distinction between those 'consisting meerely in action' (such as a writ of right of ward, a *valore maritagii*, a forfeiture of marriage, and the like) and 'chattels reals being of a mixt nature, viz. partly in possession and partly in action. . . . As if the husband be seised of a rent service, charge or seek, in the right of his wife, the rent become due during the coverture, the wife dieth, the husband shall have the arerages; but if the wife survive the husband she shall have them, and not the husband. So it is of an advowson, if the church become voyd during the coverture, he may have a quare impedit in his owne name, as

[1] P. 231. [2] P. 240. [3] P. 241. [4] Co. Litt. 120 a. [5] Co. Litt. 292 a. [6] Co. Litt. 292 b. See further as to an annuity being a chose in action, *Gerrard* v. *Boden* (1628), Hetley 80; *Priddy* v. *Rose* (1817), 3 Mer. 86; *Wiltshire* v. *Rabbits* (1844), 14 Sim. 76.

some hold; but the wife shall have it if she survive him; and the husband if he survive her; *et sic de similibus.* But if the arerages had become due, or the church had fallen voyd before the marriage, there they were meerely in action before the marriage; and therefore the husband should not have them by the common law, although he survived her[1].'

The expression, 'chose in action real,' does not seem to occur in Coke's Commentary on Littleton, but in his note on section 347, where Littleton says that no entry or re-entry can be reserved or given to a stranger, Coke remarks: 'Here Littleton reciteth one of the maxims of the common law; and the reason hereof is for avoyding of maintenance, suppression of right and stirring up of suits; and therefore nothing in action, entrie or re-entrie, can be granted over; for so under colour thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession[2].'

I have been unable to trace the process by which the term 'chose in action' came to mean exclusively a chose in action personal. It was evidently in a state of transition in the eighteenth century, because while Jacob's description of a chose in action includes choses in action real[3], Blackstone's definition, quoted by Sir Howard Elphinstone, is clearly confined to choses in action personal, for it forms part of a chapter entitled, 'Of Property in Things Personal[4].' Probably the restriction of the doctrine of descent cast[5], the limitation of actions to land[6], and the gradual disuse of real actions even before their formal abolition, are sufficient to account for the change. The point is of historical interest, because I think it explains the apparent inconsistency of the common law in absolutely forbidding the assignment of choses in action real on the ground of maintenance, and yet permitting debts to be effectually assigned by the device of allowing the assignee to sue in the name of the assignor. The inconsistency disappears if we consider that the fulminations against maintenance and champerty, which abound in the old books, were directed not so much against the maintenance of actions of debt and the like, as against abuses arising from the practice of buying up rights of entry and rights of action for the recovery of land, and (in a smaller degree) against the oppression and blackmailing of suitors by officers of

[1] Co. Litt. 351.

[2] Co. Litt. 214 a.

[3] 'A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a chose in action.' Jacob, Law Dict. 4th edit. (1739). The first edition was published in 1729.

[4] The first edition of the Commentaries was published in 1765–9.

[5] Stat. 32 Hen. VIII, c. 33.

[6] Stat. 32 Hen. VIII, c. 2.

courts and other persons of influence. I cannot account in any other way for the language used in Britton[1], Coke[2] and the statutes against maintenance, from 3 Ed. I, cc. 25 seq. down to the Act of 1540 'Agenst maintenance and embracery byeng of titles &c.[3]' Sect. 1 of this Act runs as follows: 'The king our Sovereign Lord, calling to his most blessed remembrance, that there is nothing within this realm that conserveth his loving subjects in more quietness, rest, peace and good concord, than the due and just ministration of his laws, and the true and indifferent trial of such titles and issues, as been to be tried according to the laws of this realm, which his most Royal Majesty perceiveth to be greatly hinddred and letted by maintenance, embracery, champerty, subornation of witnesses, sinister labour, buying of titles and pretenced rights of persons not being in possession, whereupon great perjury hath ensued, and much inquietness, oppression, vexation, troubles, wrongs and disinheritance hath followed among his most loving subjects, to the great displeasure of Almighty God, the discontentation of his Majesty, and to the great hindrance and let of justice within this his realm: For the avoiding of all which misdemeanors and buying of titles and pretenced rights, . . . be it enacted . . . that from henceforth all statutes heretofore made concerning maintenance champerty and embracery or any of them, now standing and being in their full strength and force, shall be put in due execution, according to the tenures and effects of the same statutes.' This is not the language of a judge or author bent on discovering some far-fetched reason to account for a technical rule of law: it is the emphatic language of a legislator who sees that maintenance and similar abuses still continue, notwithstanding numerous statutes directed against them, and accordingly makes another effort to suppress them.

The statute 32 Hen. VIII was primarily, if not entirely, directed against maintenance in relation to suits concerning land, and against the buying of 'pretenced titles.' Any one buying a right or title to lands, forfeited the value of the lands, and the seller forfeited the lands themselves, unless the seller had been in possession for a whole year before the sale, or unless the buyer was at the time of the sale in lawful possession.

Maintenance and the buying of titles by persons out of possession were illegal at common law, and this statute did little beyond adding forfeiture as a penalty[4]. One kind of maintenance was

[1] Fo. 35, 37 b.
[2] See the quotations from his reports and commentary, supra pp. 306–308.
[3] Stat. 32 Hen. VIII, c. 9. This is the title as given in the first edition of the Statutes Revised. The quotation is taken from the Statutes at large.
[4] As to the construction of the statute, see *Partridge* v. *Strange* (1552), Plowd. 77.

distinguished by the old writers as 'maintenance in the countrey,' *manutentio ruralis*, being confined to claims in respect of land[1], and the very name of champerty shows that the offence had a similar origin[2]. One reason why feoffments to uses were resorted to before the Statute of Uses was that the feoffee, if a person of wealth or influence, could assist or protect his *cestui que* use in litigation connected with the land[3].

With regard to choses in action personal, the position was materially different. It is clear from the case in 33 Hen. VIII, cited by Brooke[4], that the rules as to the assignment of choses in action real, such as rights of entry and action in respect of land, were more strict than in the case of debts and other choses in action personal. Viner goes so far as to say that though a chose in action may be assigned over for lawful cause, as a just debt, but not for maintenance, yet 'a chose in action real as entry, he [*sic*] cannot grant over: and it is not like to a chose in action personal or mixed, as debt, ward, &c.[5]' The difference between the two classes of choses in action is further shown by the fact that while the rule that a debt may be assigned by way of satisfaction or for other lawful cause, so as to enable the assignee to sue in the assignor's name, is as old as Henry VII[6], yet the question whether a possibility could be assigned, even in equity, was not, apparently, settled until 1729[7]. Again, it must be remembered that the most important choses in action personal, namely, bills of exchange, were assignable at law by the custom of merchants from an early date.

It is curious that the argument against the assignability of choses in action, possibilities, &c. on the ground of maintenance, which appeared so strong to Lord Coke[8] and the judges of his time, appeared insufficient, if not absurd, to the judges of the eighteenth century. Thus in *Thomas* v. *Freeman*[9], where the assignee of a possibility brought a suit in equity to enforce his claim, the Lord Keeper said: '*Equitas sequitur legem*, and that which is the rule of law, must be the rule here. It is a notion that has obtained

[1] Co. Litt. 368 b.

[2] See the Statute of Conspirators, 33 Ed. I.

[3] See the preamble to the Stat. 1 Rich. II, c. 9, which rehearses these abuses at some length and makes all feoffments for maintenance void: Doctor and Stud. 203; Litt. § 701.

[4] Supra, p. 305.

[5] Viner, Abr. *Assignment* D. pl. 5, 6. The authority cited from Brooke, which is the case in 33 Hen. VIII, above referred to, does not really support the second proposition in the form in which Viner states it.

[6] See the passages from Fitzherbert and Brooke set out in App. F. to Pollock on Contract. *South* v. *Marsh* (1859), 2 Leon. 234.

[7] *Thomas* v. *Freeman* (1706), 2 Vern. 563; notes to *Wind* v. *Jekyl*, 1 P. Wms. 574; *Robinson* v. *Bavasor* (1734), Viner Abr. *Assignment* D. pl. 29.

[8] See his remarks on the 'notable statute [39 Hen. VIII, c. 9] made in suppression of the causes of unlawful maintenance (which is the most dangerous enemie that justice hath)'; Co. Litt. 369 a.

[9] (1706) 2 Vern. 563.

at law, that a possibility is not assignable: but no reason for it, if *res integra*: but the law is not so unreasonable, but to allow that it may be released.' And he dismissed the plaintiff's bill. In the oft-quoted case of *Master* v. *Miller* [1], Buller J. said that the good sense of the rule seemed to him very questionable, and the strictness of the common law rule against maintenance he declared to be 'repugnant to every honest feeling of the human heart [2].'

This divergence of opinion appears to have arisen from a misunderstanding. When Coke and the judges of his day gave the evils arising from maintenance as the reason for not allowing the assignment of choses in action, they were thinking of rights of entry and action in respect of land, and other choses in action real. 'Maintenance in the country' had been a crying evil for upwards of two hundred years before Coke's time, but it seems to have almost completely disappeared in the seventeenth century. It may be doubted whether the 'notable statute' of Henry VIII against pretenced titles had much to do with this result. It is more probable that it may be attributed to the passing of the first Statutes of Limitations [3], the decay of feudalism, and the diminution of the power of the great landowners. However that may be, maintenance disappeared so completely that in the eighteenth century, as we have seen, the judges treated it as a bugbear, and now a right of entry may be devised by will or assigned by deed [4]. This alteration in the law has indirectly made obsolete much of the learning relating to 'pretenced titles [5].'

The extension of the term 'chose in action' to stock in the public funds, exchequer bills, shares in companies, &c., is necessarily obscure [6]. There does not appear to have been any funded national

[1] (1791) 4 T. R. at p. 340, 1 Sm. L. C. 9th ed. 853–4. It is curious that Buller, in commenting on the exception of the Crown from the rule, attributed it to the timidity of the courts. This is hardly fair, for the courts decided against Henry VIII when he claimed choses in action real under the general words of an act of forfeiture. Is it not more likely that the exception was a natural result of the maxim, that the king can do no wrong?

[2] Lord Redesdale in *Underwood* v. *Lord Courtown* (1804), 2 Sch. & L. at p. 65, and Maule J. in *Doe d. Williams* v. *Evans* (1845), 1 C. B. at p. 726, take a less emotional, but more accurate, view of the rule.

[3] Stat. 32 Hen. VIII, c. 2; stat. 21 Jac. I, c. 16.

[4] According to *Hunt* v. *Bishop* (8 Each. 675), and *Hunt* v. *Remnant* (9 Each. 635), stat. 8 & 9 Vict. c. 106, s. 6, does not authorize the alienation of a right of entry for condition broken. It is difficult to understand the reasons given for this decision, even with the assistance of the suggestion of Jessel M. R. in *Jenkins* v. *Jones* (9 Q. B. D. at p. 131). The section was obviously framed to carry out the recommendation of the Real Property Commissioners (Third Report, 1832, p. 69), which includes rights of entry for condition broken, as does the corresponding provision in the Wills Act.

[5] *Jenkins* v. *Jones* (1882), 9 Q. B. D. 128; *Kennedy* v. *Lyell* (1885), 15 Q. B. D. 491.

[6] It would be interesting to trace the gradual development of the law relating to shares and stocks, and the difficulty which the judges at first felt in fitting them into the fabric of the common law; this subject, however, is only indirectly connected with choses in action. References to it will be found in the cases cited

debt until after the Revolution. In the sixteenth and seventeenth centuries one of the devices resorted to by the crown for raising money was that of granting annuities, either perpetual or for a term of years, and charged on particular parts of the public revenue, but whether granted in fee or for years no question arose as to their assignability [1]. The public funds created during William III's reign were authorized by statute and were expressly made assignable [2]. Transfers of stock in the funds were always recognized by the courts of common law [3]. Nor was there any serious contest as to the assignability of exchequer bills [4].

The first English joint stock trading companies were created by charter or letters patent [5], and in each case, no doubt, the instrument of incorporation contained provisions as to the assignment of stock in the company. At all events no question as to the assignability of this kind of stock seems to have arisen [6]. In the seventeenth and eighteenth centuries the Bank of England and other trading companies were incorporated by letters patent issued under special Acts of Parliament: the stock in these companies was expressly made assignable [7]. But the question whether a company with transferable shares could be formed at common law simply by agreement between the members was long considered doubtful, and the formation of such companies was at first discouraged by the legislature [8]. After the repeal of the Bubble Act in 1825, transfers of shares in unincorporated joint stock companies were recognized by the courts [9].

It seems that the term 'chose in action' was applied to stock both in the public funds and in trading companies in the beginning of the eighteenth century, if not earlier, for a statute passed in 1729 [10] to abolish the common law rule that there cannot be larceny

in the following notes; see also *Ex parte Lancaster Canal Co.* (1832), Mont. & Bl. 94, and the cases there cited. The confusion continued as late as 1859: *Morris* v. *Glynn*, 27 Bea. 218.

[1] *York* v. *Twine* (1605), Cro. Jac. 78; *Earl of Stafford* v. *Buckley* (1750), 2 Vez. 171; *Radburn* v. *Jervis* (1840), 3 Bea. 450.

[2] Stat. 4 Will. & M. c. 3; 9 & 10 Will. III, c. 44, and other Acts of this reign.

[3] *Davis* v. *Bank of England* (1824), 2 Bing. 393; 5 B. & C. 185; see also *Bank of England* v. *Moffat* (1791), 3 Bro. C. C. 262; *Bank of England* v. *Lunn* (1809), 15 Ves. 569.

[4] *Wookey* v. *Pole* (1820), 4 B. & Al. 1.

[5] Homersham Cox, Inst. Eng. Gov. 610. Fenn on the Funds, 2. See the curious Act, 13 & 14 Car. II, c. 24, relieving holders of stock in the East India Co., the Guinea Co. and the 'Royal Fishing Trade,' from liability to being made bankrupt as traders.

[6] As to the stock of the old East India Co., see *Munn* v. *East India Co.* (1677), Cases temp. Finch 298; *Hall* v. *Cupper* (1693), Skin. 391. As to South Sea stock, see *Cud* v. *Rutter* (1719), 1 P. Wms. 570; *Emelie* v. *Emelie* (1724), 7 Bro. P. C. 259.

[7] Stat. 5 & 6 Will. & M. c. 20; 9 & 10 Will. III, c. 44. It seems that Bank stock was at one time treated as real estate; see stat. 8 & 9 Will. c. 20, s. 33.

[8] Lindley on Companies, 3.

[9] *Walburn* v. *Ingilby* (1832), 1 M. & K. 61; *Re Mexican, &c. Co.* (1859), 4 De G. & J. 544.

[10] Stat. 2 Geo. II, c. 25.

of a chose in action [1], made it felony to steal 'any Exchequer orders or tallies, or other orders entitling any other person or persons to any annuity or share in the parliamentary fund, or any Exchequer bills, South Sea Bonds, Bank notes, East India bonds, dividend warrants of the Bank, South Sea Company, East India Company, or any other company, society or corporation . . . notwithstanding any of the said particulars are termed in law a chose in action.' But the earliest instance of a government security being termed specifically a chose in action which I have noticed in the reports is *Snelgrave* v. *Bayly* [2], where a government tally was so referred to. In *Row* v. *Dawson* [3] a fund payable out of the Exchequer for public services, and in *Dundas* v. *Dutens* [4] stock in the public funds, were treated as choses in action. A few years later the question arose as to the acts which, in the case of stock belonging to a married woman, would amount to reduction into possession by the husband [5], for 'this is a species of property grown up since all these distinctions were settled in our law [6].' It is obvious that if stock were a chose in action of the same nature as a debt or claim to goods, it could never be reduced into possession unless the government voluntarily redeemed it. However, it was finally determined that if the husband procured a transfer of the stock into his own name, this was a sufficient reduction into possession to bar the wife's right by survivorship, unless he acted as executor or trustee [7]. In 1817 the question arose whether stock passed under a grant of *bona et catalla felonum*, and the court, holding stock to be 'a chose in action, or in the nature of a chose in action,' decided that it did not [8]. In 1839 the question was raised whether a contract to sell shares in a joint stock banking company (apparently unincorporated) ought to be in writing under s. 17 of the Statute of Frauds, as being a contract for the sale of goods, wares, and merchandises, and it was held that 'shares in a joint stock company like this are mere choses in action incapable of delivery, and not within the

[1] As to the origin of this rule, see Stephen, Hist. Crim. Law, iii. 144; Pollock and Wright on Possession, 233 seq.

[2] (1745) Cases t. Hardwicke, 202.

[3] (1749) 1 Ves. 331.

[4] (1790) 1 Ves. jun. 196, 1 R. R. 112. As to this case see *M^cCarthy* v. *Goold* (1810), 1 B. & B. 389. Sir H. Elphinstone thinks that Lord Thurlow in *Dundas* v. *Dutens*, and Lord Blackburn in *Colonial Bank* v. *Whinney*, considered the question whether property could or could not be taken in execution at common law as the test of a chose in action, but this is not quite so. The question before Lord Thurlow was whether stock could be taken in equitable execution, and he held that being a chose in action it could not, by analogy to the common law rule. As to the reason for that rule, see Dyer 7 b. pl. 10; *Legge* v. *Evans*, 6 M. & W. 36.

[5] *Pringle* v. *Hodgson* (1798), 3 Ves. 617; *Milford* v. *Milford* (1803), 9 Ves. 87.

[6] Per Sir W. Grant in *Wildman* v. *Wildman* (1803), 9 Ves. 176, 7 R. R. 153.

[7] *Wall* v. *Tomlinson* (1810), 16 Ves. 413, 10 R. R. 212.

[8] *R.* v. *Capper*, 5 Price at p. 266.

scope of the 17th section [1].' In 1845 it was decided that a contract for the sale of railway shares might be the subject of an action at law; it was argued that being only choses in action, they were not the subject-matter of a legal sale, but Maule J. showed the fallacy of the argument: 'A chose in action cannot be transferred so as to enable the transferee to sue at law, but there is no illegality in the transfer. The law takes notice of these shares as things of value [2].'

But although stocks and shares are choses in action within the rules as to reduction into possession and reputed ownership, and for other purposes, they are in some respects treated as being (what they really are) property of a special kind. We speak of the 'legal estate' in shares as opposed to equitable rights and interests, just as if they were land or other tangible property [3]. Again, in questions of priority between various claimants, the law relating to the transfer of shares is quite different from that governing the assignment of ordinary choses in action, such as debts. If a share were a 'chose merely in action,' an assignment of it in writing, followed by notice to the company, would vest it in the assignee, and he would take subject to prior equities. But in the case of a company governed by the Companies Act, 1862, or the Companies Clauses Act, 1845, registration is an all-important element in the transfer of shares; in fact, registration is equivalent to seisin, for when a transfer to a bona fide transferee for value without notice has been registered, he acquires the 'legal estate' in the shares free from any equities affecting prior holders [4], but until he is registered, or has acquired an absolute and immediate right to be registered, his title is liable to be defeated by the prior equitable interest of some one else [5]. And according to the better opinion, in questions between equitable assignees of shares, priority is determined by order of date, not of notice to the company: in other words, the doctrine of *Dearle* v. *Hall* does not apply to shares in companies [6].

[1] Per Denman C.J. in *Humble* v. *Mitchell*, 11 Ad. & E. at p. 208.

[2] *Tempest* v. *Kilner*, 2 C. B. at p. 308.

[3] See the cases cited in the next three notes, and *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36, which was the case of shares in an American company.

[4] *Dodds* v. *Hills* (1865), 2 H. & M. 424; *France* v. *Clark*, 26 Ch. D. 257.

[5] *Roots* v. *Williamson* (1888), 38 Ch. D. 485; *Moore* v. *North Western Bank*, '91, 2 Ch. 599; *Powell* v. *London & Prov. Bank*, '93, 2 Ch. 555.

[6] Per Lord Selborne, *Société Générale* v. *Walker* (1885), 11 App. Ca. at p. 30; per Lindley L.J., S. C., 14 Q. B. D. at p. 457; Lindley on Companies, 477. This rule does not of course affect the application of the principle of *Hopkinson* v. *Rolt* to mortgages of shares (*Bradford Banking Co.* v. *Briggs* (1886), 12 App. Ca. 29). And it may be a question whether the rule applies to companies governed by the Companies Clauses Act, 1845, s. 20 of which is not so explicit as s. 30 of the Companies Act, 1862. It will be noticed that in *Société Gén.* v. *Walker* and *Colonial Bank* v. *Whinney*, Lord Blackburn based his opinion almost entirely on considerations connected with the share certificates. As to the effect of a certificate, see *Shropshire Union Co.* v. *Reg.*, L. R. 7 H. L. 496; *Re Ottos Kopje Co.*, '93, 1 Ch. 618.

There remains the question whether 'chose in action' includes a right of action for tort, and whether the term ought to be extended to patents, copyrights, and similar kinds of property.

As regards rights of action for tort, Mr. Cyprian Williams's treatment of the subject in a recent number of this REVIEW [1] makes it unnecessary to consider it here. I would merely add that the article on choses in action in Jacob's Law Dictionary (which is the most compendious and accurate note on the subject which I have found in any law dictionary) expressly includes torts [2], and that Blackstone's definition is so incomplete as to be almost worthless. It excludes not only rights of action for tort, but such property as stock in the funds, or in a trading company, which had been settled to be a chose in action before Blackstone wrote; he also takes no notice of choses in action real. His treatment of the subject has not been adopted by his editors [3], and did not always commend itself to Sir Howard Elphinstone [4]. But it does not follow that 'chose in action' is always used in such a sense as to include rights of action for tort. On the contrary, the term as used in modern reports, statutes, and text-books prima facie means a right or property which is assignable. It would require some courage to seriously maintain that s. 25 of the Judicature Act, 1873, has made it possible to assign a right of action for tort. That section is clearly inapplicable to stocks, shares, patents, and other choses in action the title to which depends on a statutory register, and there is some doubt whether it applies to future rent [5].

As regards patents, copyrights, and similar forms of property, no writer on the subject, so far as I know, has included them among choses in action without an apology. The late Mr. Joshua Williams classified them as incorporeal property, and rightly so, because whether they are or are not choses in action for some purposes, their essential quality is that they are permanent property —not necessarily perpetual, but wholly different from such transient things as debts and other rights of action. It does not appear to have been decided whether they are choses in action or not, partly no doubt because no question could well be raised as to their assignability. It is clear that on the bankruptcy of the owner

[1] P. 143, *supra*.

[2] 'All causes of suit for any debt, duty or wrong, are to be accounted choses in action.'

[3] See the editor's note in the 21st edition of the Commentaries; Steph. Comm. ii. 11, note (C) (11th edit.); and Mr. Hadley's revision of Blackstone's chapter (Broom and Hadley's Comm. ii. 576 seq.).

[4] Elphinstone Introduction to Conveyancing (3rd edit.), 170. In Williams on Executors torts are included among choses in action.

[5] *Southwell* v. *Scotter* (1880), Week. N. 49; 49 L. J. Q. B. 356.

they pass to the assignee or trustee under the provisions of the various Acts relating to bankrupts[1], but whether they are 'things in action' within the reputed ownership clauses of the Bankruptcy Acts, 1869 and 1883, or within the doctrine of reduction into possession by a husband, are questions which do not appear to have been decided. It is however difficult to conceive that patents, copyrights, and trademarks can be 'goods' or 'chattels personal[2]' or 'chattels personal in possession[3],' when the alternative of classifying them as 'choses in action' is open to us[4]. The correct view, it is submitted, is that they are choses in action within the doctrines of reputed ownership and reduction into possession, and that in the case of a husband becoming entitled to them in right of his wife under the old law, they could have been reduced into possession by being registered in his name, by analogy to stocks and shares. This question is not likely now to arise.

The mode in which questions of priority relating to patents, copyrights, and trademarks should be determined is not very clear, owing to the loose way in which the Copyright Acts and the Patents, Designs and Trademarks Act, 1883, are drawn. As regards patents, designs, and trademarks, the register is in the nature of a register of title, for the registered proprietor in granting licenses or assigning or otherwise dealing with his privilege, does so subject to any rights appearing from the register to be vested in any other person[5], and although no trusts can be entered on the register[6], equitable assignments can be registered, at all events in the case of patents[7]. It seems to follow, first, that if *A* appears on the register as the proprietor and assigns his patent to *B*, the registration of *B* vests the patent in him free from all equities not appearing on the register, and secondly, that if *A*, instead of assigning the patent to *B*, gives him an equitable interest in it by a registered instrument, *B* takes priority over an equitable assignee under a document earlier in date, but either not registered at all, or registered after *B*'s assignment. In the case of copyright

[1] *Hesse* v. *Stevenson* (1803), 3 Bos. & P. 565.

[2] Bankruptcy Act, 1883, ss. 44, 168.

[3] Co. Litt. 351 b.

[4] The cases deciding that copyright came within the words 'goods and chattels' in the reputed ownership clauses of the old Bankruptcy Acts (*Longman* v. *Tripp* (1805), 2 B. & P., N. R. 67, 9 R. R. 617; *Ex parte Foss* (1858), 2 De G. & J. 230) are not very satisfactory, but they proceeded on the ground that 'goods and chattels' include 'intangible property,' that is, choses in action. On the same principle a policy of insurance was held to be covered by the words 'goods and chattels' (see *Williams* v. *Thorp* (1828), 2 Sim. 257; *Green* v. *Ingham* (1867), L. R. 2 C. P. 525); a policy being a thing in action is now excluded from the reputed ownership clause (*Ex parte Ibbetson* (1878), 8 Ch. D. 519).

[5] Patents Act, 1883, s. 87. [6] Sec. 85.

[7] Patent Rules, 1890, rr. 68, 71; *Re Casey's Patents*, '92, 1 Ch. 104.

in the United Kingdom, registration is only necessary to enable the proprietor to sue for infringements; it does not appear to affect the question of title or priority.

The chief result of this investigation is to confirm Sir Howard Elphinstone's conclusion that 'chose in action' is used in at least two meanings. Prima facie, it means a debt, or sum of money payable under a contract. It is so used in the Judicature Act, and also in ordinary parlance. We should never think of describing a transfer of stock as an assignment of a chose in action. In a more extended and technical sense, however, it includes shares and stocks; it is so used in the Bankruptcy Act, and in the old law of husband and wife. In a still wider sense it includes many rights which the old books treated as choses in action or 'things of that nature,' such as rights of action for torts, rights of entry, annuities, rights of presentation, &c., and also (it is submitted) some rights of more modern origin, such as patents, copyrights, and trademarks.

Possibly, too, a moral may be drawn from the history of choses in action, and that is, that parliamentary draftsmen should not use technical terms without knowing what they mean.

Following the example of Sir Howard Elphinstone, I have not attempted to deal with equitable choses in action. This branch of the subject is much less difficult—and less interesting—than choses in action at common law.

CHARLES SWEET.

## WHAT IS A THING?

THE question what is a Thing is much less simple than the question what is a Person. Roman law will tell us that some things are corporeal and others incorporeal; the Common Law will tell us that some things are in possession and others in action. The Roman division is easier on a first view; the English one is no doubt subtler, less clearly defined, and more difficult for beginners to grasp. It is therefore commonly assumed that the Roman conception is rational and the English is not. We must have a little patience before we are ready to form an opinion.

A thing is, in law, some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.

The kind of 'things' with which we are most familiar are material sensible objects which can be dealt with in the way of manual use. No difficulty occurs in treating a house, a book, or a sheep, as things. As borrower of a book, I have the right of keeping the book for the agreed time, or until re-demanded, and the duty of returning it. The book is plainly not the same as my rights, or any one's, regarding the book, or the sum of all possible rights. It would still be a real book if it belonged to nobody. We are not now considering what the possible rights, of ownership or otherwise, may be. We take it provisionally as common knowledge that an owner who has not parted with any of his rights has large powers of use and disposal over the thing owned, powers which are indefinite even though they may be limited in certain directions by rules of law.

There is no trouble, again, in extending this notion of a 'thing' to an aggregate of material things, such as land with a house and other buildings on it, a library with all the books in it, a flock of sheep. Any of these aggregates may be treated as a single thing if we find it convenient. Physical continuity is in no way essential to the identity and singleness of the rights existing over material objects. Physical discontinuity makes it, no doubt, easier to separate those rights and form new combinations; but easier only in degree. One sheep may be bought and driven off from the flock; one chair out of a set may be sold or given away. But also

when the sheep becomes mutton each leg of mutton may have a separate owner; and a chimney in a house may be repaired and the old materials taken by the builder in part payment, or a whole wing of the house may be rebuilt and the materials sold in lots.

So far we have spoken of things (as Littleton said) whereof a man may have a manual occupation, possession, or receipt[1].

But many elements of wealth are not tangible, as we know without assuming any special knowledge of law. The worth of five sovereigns is in the gold; the worth of a five-pound note, and the reason why we can get five sovereigns for it, is in the credit of the Bank of England. Whatever debts are owed to an individual, a firm, or a corporation in the course of business are part of the assets of the business. Nay more, the goodwill of a business, which is merely the right to go on using the old name, coupled with the expectation that custom will still follow the name, is often of great pecuniary value.

Then we have exclusive rights which, though not merely personal, are only remotely connected with any tangible thing, and consist in the legal power of excluding others from competition in respect of their subject-matter. One may have an exclusive right to take fish in a certain piece of water, to ferry passengers across a river for hire at a certain place, to make and sell a new machine or instrument, to multiply and sell copies of a book or a print. Again we may have rights over tangible things which belong to others; rights of way over land, rights of using or detaining goods by way of loan, hire, or pledge, and others. These rights can be and are regarded in law as having distinct and measurable values, and whatever has such value is a thing, though not a bodily and sensible thing. These benefits can be part of a man's inheritance or goods, of his 'estate and effects,' to use the largest term known to our law; they are capable of transmission and, for the most part, of voluntary alienation. We must recognize as things, in fact, all objects of exchange and commerce which are recognized by the usage of mankind.

It is often said that such things have no being save in contemplation of law: the Roman phrase is 'in iure consistunt.' But this is not accurate: for there may be 'groups of advantages,' to use Professor Holland's happy term, which have an appreciable value though the law does not recognize them. Imperfect rights of the nature of copyright, for example, might exist outside the law by usage and courtesy. Such rights did in fact exist in the United States to a certain extent before the Copyright Act of 1891,

[1] Litt. s. 10.

as regards English books made over to American publishers; and they had a certain value to the American publisher, and consequently to the British author, although they were wholly unprotected by law, and (as events showed) precarious in fact. The goodwill of a business, again, would still have a commercial value if it were less efficiently protected by law than it is; and it would probably by no means lose the whole of its value even if it were not protected at all. The law began to protect it when it became notoriously valuable and not before. Hence it seems that in the case of incorporeal things the advantage or 'group of advantages' enjoyed or to be enjoyed in fact is the true subject-matter of the right, and corresponds to the tangible object which we call a corporeal thing as distinct from the rights exercised over it. Of course the value of an incorporeal thing may be largely due to its recognition and protection by the law, and some incorporeal things may be called creatures of the law. But no one will suppose that the value of tangible property would not also be diminished if the law should cease to punish theft, or to decide questions of title. The parallel therefore seems to hold good notwithstanding the possible anomalies of extreme cases.

At this point it may be worth considering, at the risk of an apparent paradox, whether corporeal things themselves are so corporeal as we think at first. For a material object is really nothing to the law, whatever it may be to science or philosophy, save as an occasion of use or enjoyment to man, or as an instrument in human acts. In fact there are parcels of terrestrial matter which are not things in the law. Of some such parcels, on grounds of necessary convenience, we have to say 'communia sunt omnium,' the water of the high seas for example: of other such we say, for reasons of religion or state, 'nullius in bonis sunt.' This is much easier to illustrate from the Roman law than from our own; for the Common Law abhors a vacuum of property: a statement which the reader, unless he be already learned in the law, must provisionally take for granted. A thing which belongs to nobody is of no legal importance until something happens to bring a person into relation with it, and make it the subject-matter of enforceable rights. An old iron pot thrown away and dropped at the bottom of a canal, for example, might well be no more to the law than if it were in another planet. If it is something to the law, it is because the local law may happen to provide, as ours does, that abandonment shall not wholly destroy or suspend the legal qualities of a chattel which has once been a thing of value. So that on the whole perhaps we have good ground for saying that the 'thing' of legal contemplation, even when we have to do with

a material object, is not precisely the object as we find it in common experience, but rather the entirety of its possible legal relations to persons. We say entirety, not sum, because the capacity of being conceived as a distinct whole is a necessary attribute of an individual thing. What the relations of a person to a thing can be must depend in fact on the nature of the thing as continuous or discontinuous, corporeal or incorporeal, and in law on the character and the extent of the powers of use and disposal which particular systems of law may recognize. A man who has copyright in a book can alienate but cannot destroy the copyright, though he may choose, on some scruple of conscience against monopoly in spiritual benefit[1], not to exercise his right or reap the profit of it. The owner of an unique manuscript can destroy it in fact, but the law might conceivably forbid him to do so, and probably would if the obvious interest of those to whom things of unique value belong were not thought to be sufficient security against wanton destruction. Land, though it can be wasted or, in some situations, flooded, cannot be destroyed in the same sense as ordinary chattels; and some few chattels, such as the harder kinds of gems, may be considered indestructible as compared with perishable goods and even with relatively lasting materials of common use. Through all the range of natural and legal diversities, however, a thing remains, for the lawyer's purposes, that which is attributed by law to the natural or conventional thing in regard to the rights and duties of persons.

Here, then, we seem to have a necessary point of contact between law and philosophy. The lawyer as well as the metaphysician is driven, when he takes to thorough-going analysis, to face idealism. What we commonly call things are resolved by philosophical analysis into possibilities or occasions of perception. The idealist boldly says that the *esse* of material things is *percipi*. So we may say that in contemplation of law the *esse* of things is *haberi* or *in bonis esse*. That only is a thing which can, in the widest sense, be owned: it must be the subject-matter of rights that the law will recognize. An ownerless thing is for the lawyer pretty much what a 'thing in itself' is for the philosopher. A *res nullius* is as void of legally intelligible contents as is a *Ding an sich* of intelligible contents of any kind. It is merely negative and irrational; the very notion of it excludes it from the world of rational import. We can see in it, at most, the potency of a future legal significance. The 'books in my closet,' in Berkeley's famous example, are merely the potentiality of the books I shall see when I open the closet. And so the ownerless abandoned thing, in systems which admit the

[1] Count Lyof Tolstoi not long ago disclaimed all interest in the copyright of his works for some such reason.

extinction of property, is the mere potentiality of possession or ownership to come, whether the thing itself be buried treasure or a worthless tin pot. There is a legal vacuum till the act of an occupier or finder restores the thing, so to speak, to the world of legal reality. Hence, if we find in a particular system of law rules which are astute even to refinement to prevent this state of vacuum, there is no reason to treat such an endeavour as absurd. In fact the old masters of the Common Law did take the line of abhorring vacant possession or property, and put forth extreme ingenuity to avoid admitting it. Without contending that they were consciously led by any philosophic reason, one may be allowed to think that, whether by scientific instinct or by good fortune, they showed themselves on this point at least as good philosophers as the Roman lawyers.

The foregoing remarks are, as they stand, a fragment; but they may have some bearing on the difficult speculative and historical problems raised by the common law doctrine of 'things in action,' which are now under discussion in this REVIEW. My own opinion, so far as I have formed one, inclines to the conclusion that our English 'thing in action' will be found to be really equivalent in its conception to the Roman Obligation, but that the idea has been much perplexed in its application, like almost all the subtler ideas met with in English law, partly by historical accidents and partly by ignorance.

FREDERICK POLLOCK.

# THE QUASI-GRANT OF EASEMENTS IN ENGLISH AND ROMAN LAW.

OF late years the Courts have on several occasions dealt with the rights and liabilities *inter se* of purchasers from the same vendor of adjoining tenements, and after some considerable conflict of judicial opinion the law is tolerably well settled. The difficulty arises in this way: The owner of the adjoining tenements has enjoyed quasi-easements or rights analogous to easements in respect of one tenement over the other: he conveys one or both of the tenements to purchasers: how far do the rights which before the severance of ownership were quasi-easements become, after the severance, actual easements, independently of prescription or express grant? The question, said Chitty J., 'is not like the case of an implied grant where, upon reading the instrument, you say the terms employed mean so and so; and it is necessary in order to give effect to the intention, as manifested by the deed, to imply something which is not expressed in so many words[1].' In truth, if the quasi-easements are transformed into actual easements, they are so transformed, not by express grant nor by implied grant in the correct sense of the term, but by quasi-grant. The obligation or right arises neither from the express words of the instrument, nor from that which, having regard to the circumstances, must be considered the true meaning and effect of the words of the instrument, but from the position into which the parties have placed themselves by their contract. That is to say, after an examination of the surrounding circumstances the law imputes to the parties an intention that the quasi-easements enjoyed by the joint owner shall or shall not be transformed by the severance of the tenements into actual easements.

This problem has exercised the English Courts during some centuries, but it is not necessary to discuss the cases which are scattered in considerable profusion about the Year Books and the older series of reports: in these latter days controversy has settled round the vigorous judgment of Lord Westbury in *Suffield* v. *Brown*[2].

If an owner of two adjoining tenements enjoys in respect of one quasi-easements over the other, then the former is said to be quasi-

[1] *Beddington* v. *Atlee*, 1887, 35 Ch. D. p. 326.
[2] 1864, 4 De G. J. & S. 185.

dominant and the latter quasi-servient. In the alienation of the two tenements either the quasi-dominant or the quasi-servient may be granted before the other, or both may be granted at the same time. The judges had, from time to time, noticed the possibility of these three cases, and the distinctions between them. One example will suffice. In *Palmer* v. *Fletcher*[1], where the owner of a house and adjoining land had conveyed the house to one and the land to another, Kelynge J. said, 'Suppose the land had been sold first and the house after, the vendee of the land might stop the lights;' but Twysden J., to the contrary, said, 'Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor and his assignees;' and cited a case to be so adjudged. The point was not further pressed by Kelynge J., who held the view that the Courts have adopted; and before the latter half of this century there was no direct decision that the rights and liabilities of the purchasers depend on the order in time of the alienation of the tenements.

In *Pyer* v. *Carter*[2] the Court of Exchequer decided that if the owner of two adjoining houses sells first one house and then the other, and the house last sold is drained by a drain running under the house first sold, the second purchaser is entitled to the ownership of the drain, that is to a right over the freehold of the first purchaser. There the quasi-servient tenement was sold first, and the Court held that the right to the drain was reserved by implication for the owner for the time being of the quasi-dominant tenement, and gave as the reasons for the decision that the purchaser takes the house 'such as it is,' and that if he had inquired he would have discovered the existence of the drain.

In *Suffield* v. *Brown*[3], the right claimed was peculiar. The owner of a dry dock and an adjoining wharf at Bermondsey had been accustomed to allow the bowsprits of the vessels in the dock to overhang the wharf to the extent of some fourteen feet. The wharf, the quasi-servient tenement, was sold to the defendant, and the dock, the quasi-dominant tenement, was sold some years after to the plaintiff. The defendant commenced to build on the wharf up to the edge of the dock. The purchaser of the dock filed a bill to restrain the purchaser of the wharf from building in such a way as to interfere with the plaintiff's enjoyment of 'the privilege right or easement of allowing the bowsprits of the vessels in the plaintiff's dock to overhang the defendant's wharf to the extent of fourteen feet.' Lord Romilly gave judgment for the plaintiff, and after referring to *Pyer* v. *Carter*[4] with approval, said, 'That case also

[1] 1675, 1 Levinz 122, 1 Siderfin 167, 1 Keble 553.
[2] 1857, 1 H. & M. 916. [3] 1864, 4 De G. J. & S. 185. [4] 1857, 1 H. & M. 916.

established that no distinction can be founded on the circumstance that the servient tenement was sold prior to the sale of the dominant tenement, which indeed only results in a question of notice.' On appeal the Lord Chancellor reversed this decision with something like judicial contempt. He declined to agree with the remark of the Master of the Rolls quoted above, and drew a sharp distinction between the cases where the quasi-servient tenement was sold first, and the cases where the quasi-dominant tenement was sold first. Lord Westbury allowed that in the latter class of cases there was no objection to the rule that neither the vendor nor his assignees could interfere with the purchaser in the enjoyment of the continuous and apparent rights in the nature of easements which had been enjoyed by the joint owner before the severance, on the ground that the vendor cannot derogate from his own grant. But with regard to the former class of cases he said, 'The effect of the judgment under appeal is that if I purchase from the owner of two adjoining tenements the fee simple of one of those tenements, and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by the vendor.' The Lord Chancellor suggests an example, which is a *reductio ad absurdum* of the position taken by the Master of the Rolls: 'Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it, on which he has been for years in the habit of throwing out the cinders, dust, and refuse of his workshop; and suppose I, being desirous of extending my garden, purchase this strip of land and have it conveyed to me in fee simple, and the owner of the manufactory afterwards sells the manufactory to another person, am I to hold my piece of land subject to the rights of the grantee of the manufactory to throw his rubbish upon it?'

In answer to the learned Barons who decided *Pyer* v. *Carter*[1], Lord Westbury argued that the purchaser took the house not 'such as it is,' but 'such as it is described' in the contract and conveyance, and that having regard to the terms of the contract and conveyance, the purchaser in that case was under no obligation to make any inquiry as to the existence of the drain. In a brilliant passage, 'the first introduction of this extraordinary doctrine' which had been affirmed by the Court of Exchequer and the Master of the Rolls, is traced to the comparison of the disposition of the owner of two tenements to the destination *du père de famille* of the French civil code[2]. According to this comparison the owner of the entire estate which is afterwards severed stands in the relation

[1] 1857, 1 H. & M. 916.
[2] Gale on Easements, first edition, 1839, ch. 4.

of *père de famille*, and impresses upon the different portions of the estate mutual obligations and services which accompany such portions when divided among the members of the family, or even when aliened to strangers. But Lord Westbury would have none of this. 'This comparison is a fanciful analogy from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, &c.'

This statement of the law is clear and definite, and was confirmed by Lord Chelmsford in *Crossley* v. *Lightowler*[1], but the question was again relegated to the region of doubt by the remarks of the Lord Justices during the argument in *Watts* v. *Kelson*[2]. The counsel for the appellants cited *Suffield* v. *Brown*[3], and Mellish L.J., who as counsel had doubtless had no small influence in persuading Lord Westbury to his decision, interposed with the remark, 'I think that the order of the two conveyances is immaterial, and that *Pyer* v. *Carter*[4] is good sense and good law. Most of the common law judges have not approved of Lord Westbury's observations on it;' and James L.J. added, 'I also am satisfied with the decision in *Pyer* v. *Carter*.' The period of doubt continued for nine years, during which bewildered practitioners, ignorant which view would ultimately prevail, had to advise their clients either in accordance with the recorded decisions of two Lord Chancellors, or in accordance with the later reported opinions of two Lord Justices. In 1879 the Court of Appeal again had an opportunity, and this time spoke with no uncertain voice.

In *Wheeldon* v. *Burrows*[5] the owner of a workshop and adjoining land sold the land, the quasi-servient tenement, in November 1875, and the workshop, the quasi-dominant tenement, in April 1876. Some of the windows of the workshop had overlooked and received their light from the adjoining piece of land. The purchaser of the land blocked up the windows with a hoarding. Bacon V.-C. and the Court of Appeal held that he was entitled to do so, thus adopting the view taken by Kelynge J. in opposition to Twysden J. in *Palmer* v. *Fletcher*[6]. In an elaborate judgment Thesiger L.J. reviewed all the cases from *Palmer* v. *Fletcher* onwards, and in the result *Pyer* v. *Carter*[7] was definitely overruled, and the judgment of Lord Westbury in *Suffield* v. *Brown*[8] approved. James L.J., who was a member of the Court who heard the appeal in *Wheeldon* v. *Burrows*[9], appears to have retracted the opinion expressed by him in *Watts* v. *Kelson*[10].

[1] 1867, L. R. 2 Ch. 486.
[2] 1870, L. R. 6 Ch. 170.
[3] 1864, 4 De G. J. & S. 185.
[4] 1857, 1 H. & M. 916.
[5] 1879, L. R. 12 Ch. D. 31.
[6] 1675, 1 Levinz 122.
[7] 1857, 1 H. & M. 916.
[8] 1864, 4 De G. J. & S. 185.
[9] 1879, L. R. 12 Ch. D. 31.
[10] 1870, L. R. 6 Ch. 166.

There remains the class of cases where the two tenements are alienated at the same time, e.g. at a sale by auction: and here it may be remarked that in this connexion the important date is the date of the contracts, and that the dates of the execution of the subsequent conveyances are immaterial (*Beddington* v. *Atlee*[1]). In *Swansborough* v. *Coventry*[2], Tindal C.J. said: 'In the present case the sales to the plaintiff and defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the general rule of law that a vendor shall not derogate from his own grant.' This case followed *Compton* v. *Richards*[3], and was followed by Jessel M.R. in *Allen* v. *Taylor*[4], and approved by the Court of Appeal in *Wheeldon* v. *Burrows*[5]. It decides that where the grants are contemporaneous and part of one transaction, each grantee is in the same position as if he had obtained the first grant. This view of the law was applied by Chitty J. to two persons claiming under a will which 'operates as a simultaneous conveyance' of the two tenements to the devisees (*Philips* v. *Low*[6]).

In the result the law is well settled to this effect. (*a*) If the quasi-dominant tenement be granted first, there will pass to the grantee, without express words, all those continuous and apparent quasi-easements which are necessary to the reasonable enjoyment of the tenement granted, and which have been enjoyed before the time of the grant by the owners of the entirety for the benefit of the part granted. (*b*) If the two tenements are granted at the same time it is as if the quasi-dominant tenement in respect of each of the quasi-easements had been granted first, and the vendor cannot derogate from his grant. (*c*) If the quasi-servient tenement be granted first, the quasi-easements are extinguished unless preserved by express words, except in the case of easements of necessity, such as a right of way to a landlocked tenement, which are excepted from the general rule on the principle 'cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potest.'

It is somewhat curious that in no case did either counsel or judge refer to the position taken by the Roman lawyers. A reference to the Digest shows that in this particular case they had no sympathy with the doctrine that rights and liabilities could spring into existence by a quasi-grant unexpressed and to be collected from the circumstances surrounding the contract of alienation. They allowed that the owner of two tenements could, on

[1] 1887, L. R. 35 Ch. D. 317.
[2] 1832, 9 Bing. 305.
[3] 1814, 1 Price 27, 15 R. R. 682.
[4] 1880, L. R. 16 Ch. D. 355.
[5] 1879, L. R. 12 Ch. D. 31.
[6] 1891, 2 Ch. 37.

the alienation of one of the tenements, impose servitudes on one or other of them: but they required these servitudes to be clearly defined and expressed in the contract of alienation. 'Qui duas areas habet alteram tradendo servam alteri efficere potest[1].' 'Duorum praediorum si alterum ea lege tibi dederit ut id praedium quod datur serviat ei quod ipse retinet vel contra, iure imposita servitus intelligitur[2].' 'Si quis duas aedes habeat et alteras tradat potest legem traditioni dicere ut vel istae quae non traduntur servae sint his quae traduntur vel contra[3].' But if the two tenements were granted at the same time, by simultaneous grants or by will, the quasi-easements enjoyed before the severance were extinguished. 'Binas quis aedes habebat una contignatione tectas: utrasque diversis legavit. Dixi . . . ex regione cuiusque domini fore tigna nec ullam invicem habituros actionem, ius non esse immissum habere. Nec interest pure utrisque an sub condicione alteri aedes legatae sint[4].' 'Duas autem aedes simul tradendo non potest efficere alteras alteris servas quia neque acquirere alienis aedibus servitutem neque imponere potest[5].' It must be added that an exception was recognized in the case of an easement of necessity, without which the tenement to which the right was attached was incapable of any beneficial occupation. Marcellus put the case of the owner of two adjoining houses devising one house to a devisee: he had no doubt but that the heir could raise his house higher, and darken the lights of the devised house, but he added 'sed ita officere luminibus et obscurare legatas aedes conceditur ut non penitus lumen recludatur, sed tantum relinquatur quantum sufficit habitantibus in usus diurni moderatione[6].'

The civil law may be summarized shortly: if the alienation of the two tenements was simultaneous, the quasi-easements were extinguished in every case: if the owner alienated one tenement, the continuance or cessation of the rights depended on the contract of alienation, and those rights that were not expressly mentioned and reserved were extinguished. These rules were subject to the exception that in all cases the rights were preserved so far as was absolutely necessary for the beneficial occupation of the tenement in respect of which they had been enjoyed before the alienation.

The differences between the rules of English law and Roman law are obvious: it is submitted that the simple and intelligible rules of Roman law are more in accordance with sound legal principles than the complicated rules of English law, which neglect

[1] D. 8. 3. 34. [2] D. 8. 4. 3. [3] D. 8. 4. 6 pr.
[4] D. 8. 2. 36. [5] D. 8. 4. 6 pr. [6] D. 8. 2. 10.

the terms of the contract of alienation, attach undue importance to the circumstance, often accidental [1], of one contract being prior to the other, and render it necessary in each case to examine the circumstances surrounding the contract of alienation in order to decide whether or no the law will impute to the parties an additional contract which they did not make in fact, and which in many cases they did not intend to make, and would not have made if their attention had been called to the particular point [2]. Lord Westbury perceived that the contract of alienation (*lex traditionis*) ought on sound legal principles to govern the rights of the parties subsequent thereto. 'When the owner of two tenements sells and conveys one to a purchaser for an absolute estate therein, he puts an end by contract to the relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burden imposed upon it during his joint occupation, and the condition of such tenement is thenceforward determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership [3].' The rules of English law are too well settled at this date, but it is suggested that it would have been well if the Courts had adopted the dictum of Mellish C.J., that 'the order of the two contracts of alienation is immaterial,' and had applied to all cases the rule of Roman law, that the quasi-easements will not be transformed into actual easements by the fact of alienation, but that their transformation must be an express term of the contract of alienation.

ERNEST C. C. FIRTH.

[1] The facts in *Pyer* v. *Carter*, 1857, 1 H. & M. 916, *Wheeldon* v. *Burrows*, 1879, L. R. 12 Ch. D. 31, and *Beddington* v. *Atlee*, 1887, L. R. 35 Ch. D. 317, establish that the priority of one contract is often accidental: e. g. two tenements are offered for sale at the same auction; one is knocked down there and then to a purchaser; the other is disposed of by private treaty a month afterwards: according to the rules of English law considerable consequences may follow from the accident that the latter was not disposed of at the auction.

[2] *Birmingham, Dudley and District Banking Company* v. *Ross*, 1888, L. R. 38 Ch. D. 295.

[3] *Suffield* v. *Brown*, 1864, 4 De G. J. & S. 185.

## MAINTENANCE AND EDUCATION.

THE Courts have been asked from time to time, in cases of construction, to define the extent of a provision in terms of a yearly sum or of the proceeds of a fund, expressed to be made 'for the maintenance and education' of a person or group of persons, in the absence of indication, other than that afforded by the words themselves, of the intended duration of the benefit. The last judicial utterance that I can find in a case of this kind is that of Hall V.-C. in *Wilkins* v. *Jodrell*, 13 Ch. D. 564, decided in 1879. It is remarkable as expressing, (apart from authority,) a dissent from the opinion of Wood V.-C. in *Gardner* v. *Barber*, 18 Jurist 508 (1854), on the limitation of time of enjoyment which these words prima facie indicate. It is also remarkable as containing a criticism of the principal case on which Wood V.-C. relied, which made that case, in the opinion of Hall V.-C., irrelevant alike to *Gardner* v. *Barber* and *Wilkins* v. *Jodrell*. Shortly stated, in Vice-Chancellor Wood's opinion, such a provision as above mentioned for the maintenance and education of *A* ought to be considered as limited to the period of *A*'s minority, unless there is something in the context to extend it; in Vice-Chancellor Hall's opinion, such a provision should continue during the life of *A*, unless there is something in the context to confine it. Wood V.-C. considered his opinion to be supported by the authority of *Knapp* v. *Noyes*, Ambler 661, decided by Lord Chancellor Camden in 1768; Hall V.-C., while not impugning the authority or correctness of that case, was persuaded to take a view of it which enabled him to pass it by.

It is somewhat strange that the decision of Hall V.-C. should have excited so little comment, as the point is one of considerable interest and importance, and seems, from an inspection of the reports, to have arisen with some frequency. I venture to think that the point has for more than a century been covered by authority, that Wood V.-C., whose carefully considered judgment in *Gardner* v. *Barber* was never challenged until 1877, when Malins V.-C. in *Frewen* v. *Hamilton*, 47 L. J. (Ch.) 391, (presently to be noticed,) disregarded it in a rather summary fashion, was right, and that Hall V.-C. was not free to give effect to his own view. The fact that the decision in *Wilkins* v. *Jodrell*, and the consequences involved in that decision, have been noticed in various professional books in general use

(e.g. Jarman, Wills, 5th edition, i. 371, note (z); Lewin, Trusts, 9th edition, 146; Seton, Decrees, 5th edition, 1376; Simpson, Infants, 2nd edition, 315) without adverse comment, and in one case at least (Jarman, loc. cit.) with apparent approval, is my excuse for venturing on this criticism, which, if well founded, may be of some use when the point again arises. As it does not appear that Hall V.-C. would have been prepared to disregard or overrule the decision of Lord Camden if he had been convinced of its relevance, it is convenient to begin by examining that case, in which the Lord Chancellor is reported to have said that 'maintenance and education are confined to minority.' The examination will, I think, show that Hall V.-C. was wrongly advised when he professed his agreement with the argument of counsel that when Lord Camden used these words he was 'merely referring to the terms of the will then before him, being such that in that particular case they were so confined, and was not laying down any general rule that maintenance and education in such a clause or provision would ordinarily and *per se* determine with minority' (13 Ch. D. 571). And it seems to me not unimportant, as Wood V.-C., while relying on the words quoted from Lord Camden's judgment, spoke of them as 'only a *dictum*,' to examine the decision with some care in order that it may appear that these words were really something more than a *dictum*. It will after this examination be convenient to notice the chain of later cases, of which *Wilkins* v. *Jodrell* appears to be the last.

*Knapp* v. *Noyes*, Amb. 661, is a somewhat remarkable case. The judgment only is reported; it is short, and runs as follows:

'Noyes, having five children at the date of his will, gave them, by name, £1,500 each, to be paid to his daughters respectively at the time of their several marriages with the consent of his executrix and executor, or the survivor; and if any of them should marry without such consent, then he gave her or them so marrying respectively £500 only; and he gave the £1000 to such of his daughters as and when they should marry with such consent, in equal proportions.

'*Mary*, one of the daughters, having attained twenty-one, died unmarried. Q. Whether the portion survived? or, in other words, whether the time of payment is confined merely to marriage? If I should determine for the plaintiff it will be with reluctance. It is very unnatural for a parent to impose a consent to marriage during his daughter's whole life. To consider it upon the will, which I shall construe with liberality. These portions clearly vested at the death of the testator; and if they had not been devised over, I should think that in case any of the daughters had died before the time of payment, the portion would have gone to her representative.

'But still the question is, Whether marriage is the sole time of payment?

'A material observation arises on a clause in the will, by which the testator appointed the same persons who are his executors to be guardians of his daughters during their minority.

'It is a fair construction to say that he appoints the guardians merely with a view to their consent, and the same as if he had inserted that clause in the clause of consent.

'The clause of maintenance and education is also material. "*Till portions become payable*" must be understood, "*till twenty-one*, or marriage with consent."

'Maintenance and education are confined to minority; and though there may have been a case where under the word *education* the provision has been extended after twenty-one, yet that must have been a very special case, and contrary to the natural sense of the words. If this construction is right, it puts an end to the question; because the condition of marriage with consent must mean at an earlier time than twenty-one.'

Now it is to be observed that the decision ultimately arrived at by the Lord Chancellor is based on the conclusions extracted from certain indications in the will, independent of one another, but all, in the Lord Chancellor's opinion, pointing in the same direction. He argues on the antecedent unlikelihood of a testator intending to fetter his daughter's liberty of marriage during her whole life, and on the circumstance of the persons whose consent is expressed to be required being appointed to act as guardians during the daughter's minority, as though this exhibited the testator's intention to reduce the required consent to an incident of guardianship. He then relies on a further indication, which is the important point for us to notice. There was a 'maintenance and education' clause in the will, and seemingly the allowance for maintenance and education was to be made 'till portions become payable[1].' It is plain that the allowance for maintenance and education was not in terms expressed to be limited to minority, otherwise the last two paragraphs of the judgment would be pointless, as the Lord Chancellor would only have had to refer to the time-limit expressed in the will, instead of arriving at the same result by a roundabout method of inference. The argument appears to be this: 'The testator directed an allowance for maintenance and education until the portions should become payable—maintenance and education are words referable to minority in the absence of special circumstances—therefore portions must have been payable at majority, if marriage did not take place earlier.'

We are not in the least concerned with the correctness of this

[1] See the account of *Knapp* v. *Noyes* given by Wood V.-C. in his judgment in *Gardner* v. *Barber*, 18 Jur. 509.

reasoning, or with the reasoning on the other matters on which the Lord Chancellor relies in his judgment. Assuming the report to be in all points accurate—and perhaps this is a large assumption in the case of a precedent reported by Ambler—it may strike us with some surprise that the Lord Chancellor did not refer to *Atkins* v. *Hiccocks*, 1 Atk. 500, decided by Lord Hardwicke in 1737, a case which seems very much in point[1]. It also seems allowable to think that the words 'till portions become payable' displace under the circumstances the natural inference to be drawn (in the Lord Chancellor's opinion) from the use of the words 'maintenance and education.' But it seems clear that Lord Camden did not mean to say that from the particular will before him he collected a special intention of the testator that maintenance and education should only continue during minority. The words used, and the context in which they occur, require us to believe that in saying 'maintenance and education are confined to minority,' the Lord Chancellor was enunciating what he believed to be a known rule of interpretation, and applying it to a certain sentence in the will before him, extracting from this process a conclusion which, added to and agreeing with certain other conclusions extracted from other expressions in the will, justified him, (in his opinion,) in deciding that the portion of the deceased daughter of the testator survived to her representative. When we notice that the Lord Chancellor, as appears from the last paragraph of his judgment, regarded this point about the maintenance and education clause as important, if not decisive, it is difficult to regard the words 'maintenance and education are confined to minority' as a mere *dictum*[2].

[1] At the date of this judgment, Lord Camden, who is described by Lord Campbell as 'a profound jurist and an enlightened statesman,' had had a much longer experience as a common law judge than as an equity judge. See his life in Campbell's Lives of the Chancellors, vol. v.

[2] So clear did it seem to me after considering the judgment that Lord Camden intended to enunciate a general rule and not to deliver a particular interpretation, that I carefully examined all the reports of *Wilkins* v. *Jodrell* that I could find, with a view of learning, if possible, what was the nature of the argument by which counsel prevailed on Hall V.-C. to take the view of *Knapp* v. *Noyes* which he did. The case is reported in 13 Ch. D. 564, 49 L. J. (Ch.) 26, 41 L. T. 649, 28 W. R. 224, but none of these reports, either in the arguments or the judgment, throw any light upon the point. It is unlikely that the report in Ambler would be corrected or supplemented by a reference to the record without any reference to the fact in the judgment. In the report in Ambler, immediately under the title of the case, is the note [no entry], but as this is followed by a reference to a footnote which manifestly refers to the case immediately preceding, it is difficult to say to which case the reporter refers. I am inclined to suspect that counsel and judge in *Wilkins* v. *Jodrell* were misled by the headnote of *Knapp* v. *Noyes*, which runs as follows: 'Testator bequeathed to his daughters £1,500 each, to be paid them respectively at the time of their marriage with consent of his executrix or executor who are made guardians during their minority *with a clause for maintenance and education till twenty-one. Held*, a child attaining twenty-one her legacy was vested; the condition is to be understood as confined to marriage under twenty-one.' For the reasons already given, I think the provision for maintenance and education was expressed to continue 'till portions become payable,' and that, on the strength of

The next case to be noticed is not relevant to our point, so far as the matter decided in it is concerned, but it contains a *dictum* which has received some attention in later relevant cases. In *Badham* v. *Mee*, 1 Russ. & My. 631, decided by Leach M.R. in 1830, there was a devise to trustees upon trust to make out of the rents, &c., certain payments, and 'in the next place to pay, apply, and dispose of the rents, &c., unto and for the maintenance, education, and bringing up of *R. M.*, *S. M.*, and *J. M.*, the children of the testatrix' son *R. M.* during the life of her son,' residue of real and personal estate to other persons. *R. M.* the elder was living, *R. M.* the younger and *S. M.* were dead, *J. M.* had long since attained twenty-one. The question was, What interest, if any, had *J. M.* in the rents? The M.R. held that as the testatrix had fixed the life of *R. M.* the elder as the measure of the duration of the benefit, the surplus rents belonged to *J. M.* during *R. M.*'s life, but observed that 'the terms "maintenance, education, and bringing up," where no period was fixed except what was implied in the import of the words themselves, would have reference to minority.' It may here be noticed that the opinion implied in these words that, in determining the measure of a gift of this kind, the purposes expressed are to be read conjunctively 'as meaning that all the three things, maintenance, education and bringing up, are to go on together,' is criticized by Hall V.-C. as unsound. We shall see that Shadwell V.-C. and Malins V.-C., (though neither of them very consistently,) seem to be of the same mind as Hall V.-C. on this point.

In *Soames* v. *Martin*, 10 Sim. 287, decided in 1839 by Shadwell V.-C., a testator directed the interest of a sum of money to be applied for the maintenance and education of his nephew (an infant), making no disposition of the principal. The case is shortly reported, and *Knapp* v. *Noyes* does not appear to have been brought to the Vice-Chancellor's attention. *Badham* v. *Mee* was cited. The Vice-Chancellor, after saying that the nephew, in his opinion, took a life interest, added: 'In the case cited, the words were "maintenance, education and bringing up." These words necessarily apply to the infant state. But all persons who have attained twenty-one are not in a state in which they do not want education, and there is no period in life in which a person does not require maintenance.' It does not seem to have struck the Vice-Chancellor that a person, even when 'brought up,' might need education and maintenance. It may be noticed that the Vice-Chancellor seems to take a more

the meaning of the words 'maintenance and education,' it was held that the phrase must be interpreted 'till twenty-one, or marriage under.' As a statement of the *text* of the will, the words in italics in the headnote are plainly incorrect;—as a statement of the result arrived at in the judicial interpretation of the will, they are sufficiently correct, though, under the circumstances, calculated to mislead.

liberal view of the limits of education than he did seven years before in *Foley* v. *Parry*, 5 Sim. 138, and in the unnamed case referred to by Wood V.-C. in the case next to be noticed. Cf. the decision of Plumer M.R. in *Hamley* v. *Gilbert*, Jac. 354 (1821).

In *Gardner* v. *Barber*, 18 Jur. 508 (1854), certain questions arose on James Butler's will. The testator had given his real and personal estate to trustees to convert, and after certain payments to invest the residue, and out of the dividends to pay certain annuities to two of the testator's daughters during their lives, 'and upon trust that my said trustees shall from, with, and out of the said dividends, &c., pay and apply the yearly sum of £50, (and so in proportion for any less term than a year,) for or towards the maintenance and education of my granddaughter Amelia Lettice Barber,' (daughter of Amelia, another daughter of the testator,) 'in such manner as my trustees or trustee shall think proper.' The testator then directed a weekly allowance of two guineas to his daughter Amelia during her life. One question to be decided was as to the duration of the allowance to Lettice. Wood V.-C. referred to and gave an account of *Knapp* v. *Noyes*, mentioning that what he considered to be a *dictum* in that case, (which, with respect, for reasons given, I think an under-statement,) was supported by the *dictum* in *Badham* v. *Mee*; he referred with surprise to the decision in *Soames* v. *Martin*, observing that, in that case, *Knapp* v. *Noyes* was not noticed. He said (as the case is reported in 2 Eq. Rep. at p. 890), 'I must say that I think any one would have said, *prima facie*, that a gift of this description was intended during minority only.' He referred to *Foley* v. *Parry*, 5 Sim. 138, as indicating the proper extent of a provision for education, referring also to another case decided by the same judge, which I have not been able to find; he referred to and distinguished certain other cases, in which the words 'maintenance and education' exhibit the motive and purpose, but are accompanied by other expressions which furnish the measure of the gift. He noticed that in the case before him the other allowances were expressed to be given for life, and seemed to treat the absence of those words in the gift which he was considering as a significant omission. He also seems to have considered *Soames* v. *Martin* as in some respects distinguishable[1].

It ought perhaps to be noticed that in *De Crespigny* v. *De Crespigny*,

[1] It does not seem to have been observed by either counsel or judge that in the later part of the will as reported in the Jurist, there were discretionary powers given to the trustees to make certain allowances for maintenance and education with an express reference to minority. I suppose the circumstance might have founded an argument for either party. Shadwell V.-C. would have regarded it as a circumstance in favour of the extension of the allowance. See *Kilvington* v. *Gray*, 10 Sim. at p. 297.

9 Exch. 192 (1853, Pollock C.B., Parke, Alderson, and Platt BB.), a question arose upon a covenant in a deed of separation beginning, 'And for providing for the *maintenance* of the children of the said *H* and *C*,' whereby the said *H* was expressed to engage to 'pay the whole expense of the education, maintenance and support' of the children, except in certain specified events. It was held, without reference to any rule of construction, on the text of the covenant (and, with respect, considering the words used and the nature of the deed, I think rightly), that the obligation was not restrained to the minority of the children. The English cases do not appear to have been noticed by counsel, but one of them learnedly refers to Ulpian and the Civil Code. This case was noticed by Wood V.-C. in the course of the argument of *Gardner* v. *Barber*, vide 2 Eq. Rep. 889 [1].

It is also to be noticed that in *Pesant* v. *Goodwin*, 1 Sw. & Tr. 544 (1860, Sir C. Cresswell), in which a question as to the persons entitled to administration depended on the solution of a previous question as to whether certain persons mentioned in a clumsily drawn will were residuary legatees, a direction that 'all my remaining property after the hereinafter mentioned legacies be placed in proper securities and appropriated to the education of my sister *J*., the wife of *C. P.*'s, children as shall seem most beneficial to them, recommending, &c.,' was held to make those children residuary legatees. *Knapp* v. *Noyes*, and the other cases which I have referred to, were not noticed even by the counsel interested in restricting the children's interest. There is, of course, a distinction between the gift of a capital sum with a declaration of purpose and motive superadded, and a direction to apply a yearly sum, or the interest of a fund, to purposes which furnish the only indication of the measure of the intended benefit. It is old law that a gift to a person of a sum outright, *plus* a declaration of the motive and purpose of the testator, is valid, even though the fulfilment of the purpose is impossible. See *Barlow* v. *Grant*, 1 Vern. 254, *Barton* v. *Cooke*, 5 Ves. 463, referred to by Sir C. Cresswell.

In *Frewen* v. *Hamilton*, 47 L. J. (Ch.) 391 (1877, Malins V.-C.), the point again fairly arose in connexion with the interpretation of a marriage settlement. It is unnecessary for our purposes to set out the provisions of the settlement, which were somewhat complicated. I venture to think that the decision was right, as the settlement, when carefully read, seems to me to contain indications

[1] Passing over questions of textual difference, it hardly needs pointing out that the considerations respectively applicable to the determination of the extent of a covenantor's liability on his personal engagement, and to the adjustment of the respective quantities of interest to be taken by persons other than the settlor having conflicting claims on a definite fund *in medio*, are not quite the same.

that the provisions for 'maintenance and education' were intended, in effect, to create life interests. These the Vice-Chancellor does not remark upon, but his judgment is noticeable for the way in which he deals with the authorities. After commenting on the extended views taken of education nowadays, he quotes the judgment in *Soames* v. *Martin* with emphatic approval, apparently also agreeing with the *dictum* in *Badham* v. *Mee* already noticed. He says, referring to the provision in *Badham* v. *Mee*, 'It is to cease when he has been brought up, and a person is brought up when he is of full age,' seeming here to fall into the same inconsistency as Shadwell V.-C. in *Soames* v. *Martin*. After adverting to the circumstances of the children in the case, he goes on to say, 'I do not agree with many of the observations that are attributed, very likely erroneously, to Wood V.-C. in *Gardner* v. *Barber*.' It will be observed that the Vice-Chancellor does not deal with *Knapp* v. *Noyes*, which had been mentioned in the argument. It is impossible to avoid thinking that this is a rather summary way of treating a considered judgment more than twenty years old, and it is not easy to see why doubt was thrown on the accuracy of the report of it [1].

The Vice-Chancellor further relied on the fact of the children being purchasers, distinguishing the case from cases of similar interests arising under wills. It is not altogether easy to see that, for the purpose of construing the limitations then under the notice of the Court, it mattered much whether the document containing them was a settlement or a will, and whether the persons interested in the question were purchasers or volunteers. As a matter of fact, the person claiming adversely to the children appears to have been equally a purchaser. And the case which the V.-C. mentioned of *Bowden* v. *Laing*, 14 Sim. 113, in which the interest of a residue was given to the testator's widow 'for the maintenance of herself and her children,' and it was held that a daughter who left home and married during the widow's lifetime had no claim upon the widow, seems distinguishable on other grounds than the difference between purchase and voluntary gift.

In *Wilkins* v. *Jodrell*, 13 Ch. D. 564 (1879, Hall V.-C.), already referred to, the point again fairly arose on the following set of facts: A testator by a codicil to his will bequeathed to *M. A. W.* 'an annuity of £100 a year . . . . . In the event of her death, the annuity is to be continued to her children for their maintenance and education. And I have to request Mr. *W. G.* . . . . to see it

[1] It may be that the Vice-Chancellor considered the Jurist, to the report in which he seems to have been referred, as not a very high authority. Besides being reported at length in the Jurist, the case is also reported at length in 2 Eq. Rep. 888, and more shortly in 2 W. R. 407 and 23 L. T. 128. There is no substantial variation so far as our point is concerned.

carried into execution.' *M. A. W.* survived the testator, and died leaving six children, all of whom had attained twenty-one. The question for the Court was, what, if any, was their interest in the fund which had been appropriated to provide the annuity of £100. It was attempted in the course of the argument to distinguish a provision for maintenance and education in the form of an annuity from a provision for similar purposes in the way of a trust. It does not seem that this distinction had any weight with the Vice-Chancellor (loc. cit. 570). Hall V.-C., after deciding that the provision for the children of *M. A. W.* was not conditional on *M. A. W.* predeceasing the testator, and that the annuity was not intended to be perpetual, proceeded to notice the view of Wood V.-C. and contrasted it with the view of Shadwell V.-C., and, (authority apart,) agreed with the latter. He expressed the view already adverted to, that 'maintenance and education' ought to be read as 'maintenance or education,' criticizing the *dictum* in *Badham* v. *Mee*. He then noticed the weight which *Knapp* v. *Noyes* had evidently had with Wood V.-C., taking the view of that case which has been already criticized. Considering then that *Knapp* v. *Noyes* was not relevant, and that the decision in *Gardner* v. *Barber* was based on a mistake, and that there was, moreover, in that case a special context, and noticing that the decision in *Soames* v. *Martin* was in accordance with his own view, he decided to follow that case, observing that he found no indications in the will and codicil before him strong enough to vary what he thought to be the prima facie meaning of the provision. He also referred to a class of authorities not really, it is submitted, relevant, as in them the association of an adult with infants in the enjoyment of a provision expressed to be for maintenance, would seem to rebut any presumption which might be drawn prima facie from the word, that the infants' interest was to cease at majority.

In the result the Vice-Chancellor held that the annuity continued during the lives of the children and the life of the survivor.

The case of *Wilkins* v. *Jodrell* well illustrates how serious a matter the settlement of the rule of interpretation in cases of this kind may be, as between persons with conflicting interests claiming under a settlement or will. As I have already stated, it does not appear that Hall V.-C. would have been prepared to overrule a decision, more than a century old, of the Lord Chancellor's Court, had he considered it relevant, whatever his own opinion might have been[1],

[1] In 1881, Malins V.-C. in *Re Hardy*, 17 Ch. D. 798, disagreed with and dissented from *Blower* v. *Morret*, 2 Ves. sen. 420, decided by Lord Hardwicke in 1752. But this departure met with austere disapproval in the judgments in *Cazenove* v. *Cazenove*, 61 L. T. 115 (1889, Kekewich J.), and *Re Schweder* '91, 3 Ch. 44 (Chitty J.).

or to disregard Wood V.-C.'s decision, but for the mistaken view of the earlier authority which he considered the V.-C. to have taken. And, taking the view which I do, after a close examination of the old case, and after noticing that it seems to have escaped attention in *Soames* v. *Martin*, a case which has seriously affected the decision in later cases, it might seem sufficient to submit that, when the case again arises of the construction of a provision for 'maintenance and education' occurring in a colourless context, it should be regarded as a proposition covered by authority that the majority of the beneficiary marks the farther limit of enjoyment[1]. But, authority apart, it seems a fair contention that the phrase 'maintenance and education,' which occurs in almost every will and marriage settlement in express connexion with the period of infancy, has, by usage, come to have a definite prima facie association with that period. If this is so, (and Wood V.-C. and Lord Camden seem to have thought so,) comments by other judges upon the modern methods of education, and the lifelong need of maintenance, and the propriety of reading the words conjunctively or disjunctively, would seem to lose a good deal of their force.

T. K. NUTTALL.

[1] I do not mean that, even in such a case, there might not be *extrinsic* facts—e.g. the full age, (known to the testator,) of the beneficiary at the date of the will—strong enough to warrant the Court in deciding that the intention was to confer a life interest.

## SOME POINTS OF DIFFERENCE BETWEEN ENGLISH AND SCOTCH LAW.

NOTHING is so interesting to the man who studies the science of law for its own sake, as the comparison of different systems of jurisprudence. Where these systems have grown up side by side, and in immediate proximity to one another, as in the case of the legal systems of England and Scotland, the comparison becomes doubly interesting. Prior to the reign of Edward III the ideas of the Scottish jurists were largely influenced by the jurists of England, and the law of both countries developed very much on the same lines. A striking similarity is to be found in the legal systems of England and Scotland as they existed in the fourteenth century. In the reign of Edward III, however, political circumstances supervened, which threw Scotland into the arms of France, and from that time until the beginning of the present century, Scotland may be said to owe little or nothing to England in the matter of law. Within the last hundred years, however, a process of assimilation has been going on, which has tended to soften down the differences which exist between the law of England and that of Scotland, and if the two countries continue to remain subject to one Parliament, these dissimilarities may ultimately disappear. In passing the recent Sale of Goods Act, 1893, Parliament took one more step in this direction. It may not be uninteresting to describe some of the more prominent points of difference, which at present exist between the legal systems of the two countries.

In Scotland a promise to give, or deliver, or pay, or do, or abstain is binding without any preceding consideration, provided it is undertaken as a final engagement and not mentioned as a mere probable intention. In this respect the law of Scotland differs fundamentally from the law of England, which holds that obligations undertaken without consideration do not bind the parties. The result of the Scotch doctrine is that donations once made, otherwise than by last will or *mortis causa* are irrevocable, except between husband and wife. Again a person may be immediately and irrevocably bound by a delivered document to pay an annuity or legacy after the promisor's death. Gratuitous promises, however, are by statute liable to be declared void at the suit of a prior creditor, if the grantee is a near relation or confidant.

There is no statute similar to the English Statute of Frauds in

Scotland. Neither contracts for the sale of goods above the value of £10 nor contracts not to be performed within a year need be in writing. The sale of goods is effectually proved by verbal or written evidence or by admission of the party to be charged. When the bargain is made by the principal without writing, the evidence of two witnesses, or one corroborated by circumstances, is necessary, or the letters of the party, holograph or signed by him, are good proof. The English rule requiring that the consideration should be stated in contracts for the sale of land, and in consideration of marriage, and in promises by executors, is unknown in Scotland. As no consideration is necessary to a contract, none need appear in writing. Again in England if *A* makes an offer to *B* and *B* asks for time to consider, *A* having received no consideration for waiting need not do so. In Scotland *A* must wait because no consideration is necessary to support the contract. Scotch law requires, however, that contracts for the sale of land, copyright and ships should be in writing. In America the English Statute of Frauds has been generally adopted. In France the law of sale is not very different from that of Scotland. Verbal evidence is admitted, but with jealousy and caution. The law of Holland most nearly resembles that of Scotland.

There are no bills of sale in Scotland, except in connexion with the transfer of ships. Possession presumes property in moveables, or goods and chattels, to give the English equivalent. Where the possession of moveables is retained, neither an instrument of possession nor actual delivery, if the thing be immediately restored, has any effect in passing the property so as to counteract the presumption of property arising from possession. It is on this principle that in Scotland a factor in possession of goods has at common law a power to pledge, which in England is given by statute. A person, however, may acquire moveables by purchase, for example the furniture of an inn, and take delivery through a tenant or other bailee and leave them in his possession on a contract of hire and purchase without exposing them to the danger of being seized by the tenant's creditors.

In Scotland it is a condition implied that goods shall be fit for the purpose for which they are bought and such as they are represented or taken to be, according to the fair understanding of the parties. When the thing bought is produced to the buyer, the rule *caveat emptor* applies in Scotland as in England. Formerly the law of Scotland held that in contracts of sale the Roman maxim *caveat vendor* applied. In every contract of sale there was, according to the old Scotch law, an implied condition that the thing sold was merchantable and fit for the purpose for which it

was sold, and the seller, though quite ignorant of the latent defect, and though the goods had been examined by the purchaser, was liable if it should turn out that the article was substantially defective. In 1856, however, by the Mercantile Law Amendment Act (19 & 20 Vict. c. 60), the law of Scotland was assimilated to that of England and *caveat emptor* became the rule in the north as well as in the south.

Until quite recently a warranty was regarded in Scotland, not as a mere collateral contract, but as an absolute qualification of the contract of sale. If a man bought a horse with a warranty of soundness and the horse proved unsound, his only remedy was to return it. He could not keep it with an abatement of the price. By the Sale of Goods Act, however, it has been enacted, that a buyer may either reject the goods and treat the contract as repudiated, or he may retain them and claim compensation in damages.

In Scotland a deed need not be sealed. Sealing fell into disuse towards the end of the sixteenth century. A mark or cross is not a sufficient signature to a deed in Scotland. A deed thus signed is null. In the case of a person who cannot write, the deed must be executed by two notaries before four witnesses. The party must touch the notaries' pen in token of authority or must acknowledge it before the witnesses. In Scotland no distinction exists between specialty and simple contract debts. The doctrine that a simple contract merges in a specialty is unknown in Scotland. The distinction in Scotland is not between contracts under seal and simple contracts, but between contracts in writing and verbal contracts. By Scotch law a writ, whether a deed or not, can only be set aside by another writ.

According to Scotch law a mistake of law as well as of fact invalidates a contract, when its existence excludes real consent. The mistake of law, however, will not always entitle to restitution after the contract is fulfilled or money paid. If there is bona fides and money is paid with full knowledge of the facts, though there is no debt, it cannot be recovered back, merely because paid in ignorance of law, unless the circumstances are such as to render it inequitable for the party receiving the money to profit by the mistake of the other. In England the maxim *ignorantia juris neminem excusat* applies to cases of error in contract as well as to payment of money in error. The application of the English rule, however, has in practice been much restricted, and it may almost be said that in this matter the English and Scottish law are practically in harmony.

In Scotland a company is a distinct entity, separate from the

partners, and competent to maintain relations with third parties by its separate name or firm. The partners are regarded simply as sureties or 'cautioners,' to use the Scotch term. The firm may stand in the relation of debtor or creditor to any of its partners and can sue and be sued by any of them. Two firms having one or more members in common may sue each other. In England since 1876 actions may be brought by and against partners in the name of their firm, but this change of practice does not alter the old doctrine of English law, which refuses to recognize the firm as a separate person.

In Scotland trespass is not actionable without malice or substantial damage. The only way of enforcing right of possession and excluding intruders, is by obtaining an interdict, or, as it is called in England, an injunction, against the trespasser. The only penalty to which the trespasser is subject (apart from destruction of property or malice), is the expense of the application for the interdict. The interdict will only be granted in case of a well-founded application, and where there is reasonable apprehension that the trespass will be repeated. Thus in 1885 where a shoemaker in Ross-shire allowed a pet lamb belonging to him to stray on to the skirts of a gigantic deer forest, extending over 200,000 acres, and the lessee of the forest applied for an interdict against him, the Court of Session declined to grant it. The use of force to eject a trespasser is unlawful and would found a claim for damages at his instance. There is no Scotch maxim corresponding to the English one, that 'the Englishman's house is his castle.' In the eye of the law of Scotland, a Scotchman's house is not his castle. A bailiff has an absolute right of opening shut and lock-fast places.

Scotch law permits a direct action for seduction, a claim for which may be combined with a claim for breach of promise. A husband may sue the seducer of his wife on the ground of loss of her society and of domestic unhappiness and of injury to the family. A decree of divorce need not precede the claim. Scotch law knows no distinction between libel and slander. According to Scotch law, in an action for defamation there are two matters to be taken into account in considering the question of damages, namely, the injury or loss suffered actual or probable, for which reparation is sought, and the insult and offence to the individual for which a solatium is due. Thus in Scotland an action lies for a slander contained in an unpublished letter sent to the pursuer or uttered to himself when no other person is present. But words which would found an action if addressed to a third party, may not do so when addressed to the party himself, who complains of them.

It need hardly be said that English law considers the pecuniary loss only, in giving damages for defamation.

By Scotch law marriage is a consensual contract requiring no particular solemnity nor even written evidence, but deliberate and unconditional consent alone. There is no absolute necessity for publication, or solemnity, or celebration, or particular place or time of celebration [1]. Marriages may be regular, clandestine or irregular. Certain forms defined by statute have to be observed in order to constitute what is called a *regular* marriage. A regular marriage is one celebrated by a clergyman before two witnesses after the publication of banns or notice to the Registrar. It may be celebrated in a private house, at any hour of the day or night, and no particular form of words is necessary. A marriage celebrated by a clergyman without publication of banns or notice to the Registrar is called a clandestine marriage, and both the parties and the clergyman are liable to penalties. The marriage, however, is perfectly valid. A marriage may also take place by mere consent without a clergyman. Such a marriage is called an irregular marriage. It may be constituted (1) by declaration *de praesenti* before witnesses or by written acknowledgement of the parties, or (2) by promise *subsequente copula*, or (3) by cohabitation with habit and repute, or in other

[1] In England till 1753 the contract of marriage was as little encumbered with forms as in Scotland. Hence arose the notorious 'Fleet' marriages, which became so great a scandal, that in 1753 the Act 26 Geo. III. c. 33 was passed with the view of putting an end to them. A number of clergymen who were confined in the Fleet prison for debt, supported themselves by marrying any couple who applied to them, without licence or banns. The clergyman was liable to a penalty of £100, and to suspension, but the marriage was good. The Fleet clergy were not likely to be deterred by fear either of the penalty or the suspension. They had nothing to lose, and the marriage was valid whether the clergyman was suspended or not. Many of the marriages were entered into by unmarried women or widows, who wished to transfer the burden of their debts to their husbands. The parsons were quite willing to manipulate the register if the parties so desired. After the abolition of the Fleet marriages, the registers, such as they were, passed from hand to hand till 1821, when they were purchased by Government. Prior to the purchase by Government the possessors of many of these registers made a business of advertising them as open to the search of parties interested. Some curious entries are to be found. One parson records that the parties 'stole my clothes-brush.' In the case of another marriage, 'the woman ran across Ludgate Hill in her shift,' in pursuance of a popular but erroneous belief that a man was not liable for his wife's debts if he married her in this dress. In another instance there was a 'Mar^e upon Tick.' In yet another case the supposed husband 'was discovered after the ceremony was over to be in person a woman.' In case of a successful imposture of this kind the wife got rid of her debts without being burdened with a husband. In a certain bigamy trial it was sworn by one of the witnesses that anybody might have a certificate at a certain house for half-a-crown without any ceremony of marriage whatever, and have their names entered in the book for as long time past as they pleased. The parties were sometimes married by their Christian names only. It is said that heiresses were occasionally abducted and married by force. The clergymen were often men of good breeding and education. One Fleet parson, Dr. Gaynam, popularly known as 'the bishop of Hell,' appearing as a witness in a bigamy trial, and being asked if he was not ashamed of his vocation, replied, with a bow, 'Video meliora, deteriora sequor.' In 1753, by the passing of the Act 26 Geo. III. c. 33, these Fleet marriages came to an end.

words by the parties living together as reputed husband and wife. In the case of the first class of irregular marriages, the consent of both parties must be clearly expressed or implied. Thus if *A* says in presence of witnesses, 'this is my lawful wife,' and she curtsies in assent, this is sufficient. The consent may also be implied from such conduct as the man's living with the woman, or putting her at the head of his table. It is not clearly settled whether a promise *cum copula sequente* amounts to marriage, or is merely a ground for a suit to declare marriage. It is probably the latter. Such was the opinion of Lord Fraser, one of the highest authorities on Scotch matrimonial law. In order to constitute marriage by cohabitation with habit and repute, there must be cohabitation as well as repute, and the parties must mean and intend marriage, and be free from any legal impediment to marry [1].

The ease with which the matrimonial knot can be tied in Scotland led to the notorious Gretna Green marriages, which were such a source of trouble to parents in the good old days. There were several villages on the Scottish border to which fugitive English lovers were wont to direct their flight, but Gretna Green was of course the most notorious. The parties simply admitted before witnesses that they were husband and wife. The officiating functionary, who at Gretna Green was generally the blacksmith, signed a certificate of marriage which was also signed by two witnesses, and the marriage became by Scotch law absolutely indissoluble. The statute 19 & 20 Vict. c. 96 put an end to these Gretna Green marriages, by requiring that one of the parties should have resided in Scotland for twenty-one days [1].

[1] A curious custom existed on the borders of Scotland in former times known as 'handfasting.' Readers of Scott's romance, The Monastery, will remember the description of the custom given by the Baron of Avenel (chap. xxv): 'We bordermen are more wary than your inland clowns of Fife and Lothian—no jump in the dark for us—no clenching the fetters around our wrists till we know how they will wear with us—we take our wives, like our horses, upon trial. When we are handfasted, as we term it, we are man and wife for a year and a day, that space gone by, each may choose another mate, or at their pleasure may call the priest to marry them for life—and this we call "handfasting."' The custom arose partly from the want of priests. While the convents subsisted, monks were detached on regular circuits through the wilder districts to marry those who had lived in this species of connexion.

[2] The looseness of Scottish notions about marriage is in strong contrast to the ideas prevalent in England. In spite of the permission accorded by law to celebrate marriages in dissenting places of worship, a very large proportion of English dissenters prefer to be married by the clergy of the Anglican Church. The clergy, it is said, perform about seventy per cent. of English marriages. There is a suggestion of permanency about a marriage in the Established Church, which a marriage elsewhere lacks. It is an involuntary homage paid to the antiquity of an institution which has nearly twenty centuries of life behind it. It was so even when the Church of England was disestablished during the Commonwealth. Such a sturdy nonconformist as Oliver Cromwell was not free from this prejudice. Clarendon in his History of the Rebellion (bk. xv, par. 51), writing of the marriage of Cromwell's daughters, relates that though they were married first according to

In Scotland, the husband's adultery alone, without cruelty, entitles the wife to divorce. Wilful desertion, by either party, if obstinately persisted in for four years, is also a ground for divorce in Scotland. In the eye of Scotch law mutual guilt is no bar to a divorce. It entitles the parties to mutual divorces, the effect of which appears to be that neither party can claim any interest in the estate of the other. In granting divorce to parties who are mutually guilty, the Scotch law differs not only from the English law, but from the Canon law and the Roman law as well. If a respondent has been divorced for adultery with a co-respondent named in the decree of divorce, the respondent and co-respondent cannot subsequently marry. This rule of law is not confined to Scotland. According to the Scotch case of *Beattie* v. *Beattie* in 1866, it is or at any rate was the law of Lower Canada. It is well known that by Scotch law, as by the Roman law, the child is legitimated by the subsequent marriage of parents. In the reign of King Henry III an effort was made to import this excellent rule into the English law, but the barons of England refused. 'Nolumus leges Angliae mutari,' said they. Even in cases of bigamy, bona fides in one of the parents, though it does not render the marriage valid, seems to make the children legitimate. In Scotland a man can only dispose of a limited part of his moveable property by will. He cannot pass over his wife or children in the testamentary disposition of his moveable estate. The wife is entitled to her *jus relictae*, being one third or a half of the moveable estate, according as there are children or not, and the children are entitled to their *legitim* or 'bairn's part,' being one third or a half, according as there is a widow or not. A similar rule seems to have prevailed at one time in many parts of England. The shares of the wife and children were called their 'reasonable parts,' *rationabiles partes*. There is some doubt as to whether the rule was part of the common law or whether it was a custom peculiar to certain counties. Glanvil, Bracton, Fitzherbert, and Sir Henry Finch all speak of it as part of the common law of the land. Lord Coke, on the other hand, asserts that there must be a custom alleged in some county to enable the wife and children to the writ *de rationabili parte bonorum*, and that it had been so resolved by parliament. Lord Coke is probably correct. The custom continued in use in the province of York, the principality of Wales, and the city of London till modern times. By the statute 1 Vict. c. 26, however, it was enacted that

the rites and ceremonies then in use, they were afterwards privately married by Episcopal ministers according to the form of the Book of Common Prayer, and 'this with the privity of Cromwell, who *pretended* to yield to it in compliance with the importunity and folly of his daughters.'

every person should be at liberty to devise and bequeath all his real and personal property as he pleased.

In Scotland there is no division into felony and misdemeanour. Grand juries are unknown, except in cases of treason. It is the duty of the public prosecutor to see that there is a prima facie case against a prisoner. Coroners are also unknown in Scotland, but the procurator fiscal, who is a sort of local public prosecutor, makes an *ex parte* inquiry into any case of suspicious death. The right of private prosecution exists, but is seldom or never exercised. Every prisoner, however poor, is entitled by statute (Scots Statutes, 1587, c. 91) to have a counsel to defend him. If the prisoner has not previously applied for counsel, the Court will, as a matter of course, assign one to him, as soon as the diet is called. If no counsel are present, the sheriff of the county, who is always a counsel, and generally in active practice, and who must give his attendance at circuit, is named by the Court to defend. The jury numbers fifteen in criminal cases. A majority is sufficient to convict a prisoner. The jury may return three verdicts, 'guilty,' 'not guilty,' and 'not proven.' The verdict of 'not proven' does not, as many people seem to think, allow of the prisoner's being brought up for trial on the same charge a second time. After the verdict of 'not proven' is given, the matter becomes *res judicata*, and further proceedings on the same charge are barred.

J. A. Lovat-Fraser.

## THE INSTITUTE OF INTERNATIONAL LAW.

THE Institute of International Law was holding its fifteenth session when the last number of this REVIEW was appearing. As its next meeting is to be held at Cambridge, a short account of its origin and work may be welcome to those who are interested in the Law of Nations and the efforts made to bring states to a wider and more effective respect for the rules and proprieties of conduct which civilized nations are agreed in considering right.

The Institute came into existence in 1873. Dr. Lieber, the American publicist, M. Moynier, a distinguished Genevese, and M. Rolin-Jacquemyns, then a well-known Belgian advocate, afterwards Minister of the Interior at Brussels, and at present legal adviser to the King of Siam, conceived its formation immediately after 1870, at a time when the horrors of war were still vividly present to men's minds, and the desirability of fixing the humane principles which should govern it when inevitable, and of seeking in common the means of avoiding or settling disputes where possible without it, struck publicists in Europe and America as an object worth a great effort. M. Rolin-Jacquemyns, who had then just founded the Revue de Droit International, took the lead with singular energy. He communicated confidentially with twenty-two of the best-known publicists of Europe, and set forth his scheme of a 'conférence juridique internationale' in view of creating a 'corps permanent ou académie pour l'étude et le progrès du droit international.' The conference was held at Ghent, on September 8, 1873, and the Institute was the result. All precautions were taken in the rules framed for its government to preserve the international character of the body, and though the language adopted as that of the deliberations was French, the meetings of the Institute were to take place in different States of Europe. Its next meeting, in 1874, took place at Geneva. It has since met at the Hague, Zürich, Paris, Brussels (twice), Oxford, Turin, Munich, Heidelberg, Lausanne, and Hamburg. It has met twice at Geneva, Brussels, and Paris.

The idea of the founders of the Institute was not that by appeal-

ing to popular feelings about war and its terrors and horrors, an era of peace would result. As advocates and professors they knew and taught that there is a public law of Europeans, that there are rules which tend to prevail in intercourse between States, and which are observed though they have no sanction but the public opinion of the civilized world. This public opinion is of necessity mainly that of professors and writers in the field of international law. Incorporation of these professors and writers into a society composed exclusively of them, and the creation by their joint resolutions of a *corpus juris gentium* for the guidance of statesmen, seemed calculated to facilitate the development of the reign of right and law among nations.

The Institute has remained true to its purpose by admitting none within its circle but those who, by their science or experience, can forward its object. Its mode of operation is to study all questions during the intervals between the meetings in permanent commissions, among which the whole domain of international law is divided up. The commissions, under the direction of their *rapporteurs* or conveners, prepare reports and proposals, which are printed and distributed among the members some time before the plenary sittings at which they are to be discussed. Many questions, like those of extradition, prize law, territorial waters, have been thus under consideration for many years. By this constancy and sequence in the work of the Institute its resolutions have the authority attaching to a mature expression of the views of the leading international jurists of Europe.

On the other hand, the Institute, through the writings and teaching of its members, reaches the younger generations, who listen with respectful ear at the universities and law-schools to the distinguished men who explain to them the rights and duties of States.

The Institute is thus in a twofold way unobtrusively rendering service to mankind. Indeed, its very influence is in some sense proportioned to its sincere indifference to publicity.

The maximum number of members is fixed at 120, divided into two classes—those who 'have rendered services to international law in the domain of theory or practice,' denominated members, and those 'whose knowledge may be useful to the Institute,' called associates. There is no distinction, however, between members and associates except that the latter have no part in the government of the corporation. Moreover, as it has become customary (since 1878) to elect candidates first as associates only, the *status* of associate is practically without distinction as to the scientific value of the two classes.

To preserve the international character of the Institute, the articles provide that no country shall possess more than one-fifth of the total number of members and associates combined. At the present moment the total number is 113, of whom 56 are members and 57 associates.

The following table, compiled from M. Lehr's *Tableau général* of the work done by the Institute, shows the proportionate composition of the body by nationality:—

| | | | |
|---|---|---|---|
| Germany | 19 | Holland | 3 |
| France | 18 | Argentine Republic | 2 |
| Great Britain | 13 | Denmark | 2 |
| Italy | 11 | Portugal | 2 |
| Belgium | 8 | Turkey | 1 |
| Switzerland | 7 | Venezuela | 1 |
| Russia | 6 | Costa Rica | 1 |
| Spain | 5 | Japan | 1 |
| Austria-Hungary | 5 | | |
| Sweden and Norway | 5 | | 113 |
| United States | 3 | | |

The large number of law-schools and professorships of international law in Germany and France explains the greater proportion of seats held by these two countries.

The labours of each year are chronicled in an admirably printed *annuaire*, which is to be had through the booksellers. In it are published the final memoirs of the commissions and the essential parts of the discussions at the plenary sittings on the propositions submitted by the commissions. These form, with the volume which has just appeared recording the past year's work, a series of twelve volumes. The present general secretary, M. Lehr, in the *Tableau général* above mentioned, has had the happy thought of selecting and publishing in a separate volume all the resolutions adopted from 1873 to 1892. He has accompanied each part by a succinct *historique*, and the whole, with its etched portraits of the past presidents, forms not only a pretty volume but a valuable compendium of the results of revision, by the men of authority on the subject, of the existing law of nations.

This *tableau* shows that the Institute, though they have by no means dealt with the whole area of international law, and have plenty of work still to do, have well employed the twenty years of their corporate life.

The record is appropriately headed by a project for the publication and centralizing of international treaties and arrangements. The Swiss Government has taken the matter up, and it is believed that an international union similar to that for the joint publication of customs tariffs will issue from the negotiations.

The Institute, however, has gone further than this in endeavouring

to bring about a collection together of all the laws of the world in a central library accessible to everybody. Excellent work in this respect has been done by the Foreign Laws Committee of the French Ministry of Justice. The library of foreign laws in the Place Vendôme is certainly far from complete, but, considering the smallness of the funds the French Parliament allows for the purpose, the Committee does wonders in increasing its well-organized collection.

In maritime law collisions at sea were for some years the subject of long and careful discussion, which resulted in the adoption in 1888 of a code and regulations which, though it cannot be considered as an expression of the views of the English members, embodies the views of a considerable majority of the continental writers.

The treatment of private property at sea during maritime war, prize-court procedure and a code of prize law, over which the Institute spent five or six years, pacific blockade, and, lastly, the rules which have just been adopted in Paris on territorial waters, form the rest of the work done in maritime law.

The navigation of international rivers, the position of the Suez Canal, the protection of submarine cables (an international convention followed the discussion and resolutions on this question), form another group of subjects.

The code of the laws and customs of war drawn up by the Institute has become the text on the subject on the continent of Europe.

Extradition has been on the orders of the day since 1877, and is still under examination, the basis being, however, the now famous Oxford articles adopted at the Oxford meeting in 1880.

Occupation of territory, arbitral procedure, the exclusion and expulsion of foreigners, the position of foreigners and foreign sovereigns in the Law Courts, conflicts of law in maritime assurance, company's law, bills of exchange, bankruptcy, capacity, marriage, divorce and guardianship, complete the list of the work done to date.

Fifteen commissions are at present at work on questions of guardianship, copyright, the position of vessels and their crews in foreign ports, the use of the national flag, the position abroad of foreign corporations, the penal sanctions which can be given to the Geneva Convention, the regulation of international transport, contraband of war, compensation to foreigners for damage sustained by them through civil war, rioting, &c., nationality, naturalization and expatriation, international measures in relation to stolen securities, judicial arrangements as regards European litigants in the East, diplomatic and consular immunities, and the registra-

tion of births, deaths, and marriages by consuls and diplomatic agents.

Only three or four of these commissions will be in a position to advance work at Cambridge, where the chief subjects of discussion will probably be contraband of war and nationality. The commission on the former subject, under the convenership of M. Kleen (most of whose books on international law unfortunately are only read by those who are masters of the Swedish language), have printed quite a literature preparatory to the discussion[1]. The nationality question, at a time when the continent seems to be drifting into subordinating everything to the increase of the soldiery, and France in particular, panic-stricken at her own small procreative power, is increasing her population by turning foreign residents into Frenchmen in spite of themselves, is marked out as one of the most important of the day.

The meeting last spring in Paris signalized itself by the adoption of a code on territorial waters, a subject of particular interest in this country owing to the recommendation of the recently issued report of the Select Committee on Sea Fisheries (1893); and another on bankruptcy, which is about to form the subject of an official international conference at the Hague.

The unscientific nature of our legal studies preparatory to a professional career places the work of the Institute beyond the beat of most English lawyers[2]. This is to be regretted, but is hardly to be helped till we increase the scope of legal education in England. There is, moreover, a tendency among English lawyers to look with the same distrust upon theory in law as other Englishmen do upon theory of all kinds, especially when emanating from a body whose titles to speak are not laid out before them for examination.

In this respect no corporation is more exacting than the Institute itself, which, prior to admitting any one into its midst, privately submits a printed biography and list of the publications of the candidate for the consideration of the members, and only such as a majority consider fit to help on the work of consolidation and reform in international law are received.

It is certain that when once the Institute and its labours and objects are familiar to Englishmen, it will find no heartier welcome

[1] One of these, published by Pedone-Lauriel in Paris, is a volume by M. Kleen, entitled *De la Contrebande de guerre et de transports interdits aux neutres d'après les principes du droit international contemporain.* 1893.

[2] The English members are as follow:—Sir Travers Twiss, Q.C., and Sir R. Hart, G.C.M.G., hon. members; Professors Westlake, Holland, and Dicey, Lord Reay, Mr Hall, and the writer, members; and Mr. Justice Scott, Sir Sherston Baker, Sir D. Mackenzie Wallace, Professor Leech, and Mr. T. J. Lawrence, associates.

than in this country, where it is true the humanitarian character of a movement is often mixed up with considerations of personal aggrandizement, but where sincerity, intrinsic merit, independence, and modesty never fail to meet with an appreciation all the greater because these virtues are seldom found together.

THOMAS BARCLAY.

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# REVIEWS AND NOTICES.

**[Short notices do not necessarily exclude fuller review hereafter.]**

*Les Origines du Droit International.* Par ERNEST NYS. Bruxelles: A. Castaigne. Paris: Thorin et Fils. 1894. 8vo. 414 pp.

IN this important and interesting volume we have not so much a history of International Law during the earlier centuries of its development, as a series of essays upon its leading characteristics during that period. The plan of the work is, in fact, not dissimilar to that of Mr. Ward's *Enquiry into the foundation and history of the Law of Nations in Europe, from the time of the Greeks and Romans to the age of Grotius*, published in 1795. But many sources of information which a century ago were inaccessible are now open to the student of such matters. Chronicles have been carefully edited, long-lost charters and secret memoirs have been brought to light, State papers have been catalogued, vast miscellaneous collections of MSS. have been indexed, and elaborate monographs have appeared upon almost every topic of International Law. M. Nys, in ability at least the equal of his predecessor, has made the fullest use of his improved opportunities, and has found time for researches which have resulted in not a few curious biographical and bibliographical discoveries, as also in the correction of various erroneous statements which have too long been handed on from one text-writer to another. M. Nys deals successively with the mediaeval conception of the science, the Papacy and the Empire, war and Christianity, steps short of war, private war, causes of war, war against infidels, balance of power, the lawfulness of war, declaration, conduct of warfare, Peace, Commerce, Diplomacy, Discovery, Mare Liberum, 'Les Irénistes.' Some of these topics have been treated of previously by the same author, in one or other of the numerous works upon the Law of Nations published by him during the last fifteen years, such as *La guerre maritime, Le Droit de la guerre et les précurseurs de Grotius, L'Arbre des batailles d'Honoré Bonet, Les Commencements de la Diplomatie jusqu'à Grotius*[1]; but the materials thus accumulated have been thoroughly re-tested and re-polished before being used for the purposes of the new book, which is a storehouse of first-hand information, and indispensable to any good legal or historical library.

It is of course possible to differ from the author here and there upon questions of detail, though the wise critic will be chary of doing so. It is, for instance, hardly fair to Richard Zouch to say that he borrowed, without acknowledgement, the term 'ius inter gentes' from Vittoria. This term (whence Bentham's 'International Law') was deliberately coined by Zouch as a name for the new science, though the words composing it enter incidentally into a sentence written by Vittoria, as also indeed into sentences written by Suarez, Selden, and Grotius. M. Nys does ample justice to the admirable statement by Suarez of the true nature of International Law, but he omits to mention the earlier and equally lucid account of the matter given by Richard Hooker. He has plenty of continental authority for holding that International Law is a 'droit véritable,' but the authorities on the other side are surely too respectable to be dismissed with the remark

[1] LAW QUARTERLY REVIEW, Vol. I, p. 102.

that 'la question ne doit plus être discutée de nos jours.' One may be disposed to doubt whether the chapter entitled 'le commerce' might not, for any bearing which it has on the main subject of the book, have been better omitted. But these defects, if such they be, are trifles compared with the solid contribution to knowledge for which we are indebted to M. Nys. His chapter on 'les causes de la guerre' may be especially cited as abounding in interest and in recondite learning. Few, even among specialists, will not meet there with writers of whom they had not heard before, but who are well worth hearing about. The early English military ordinances may, it is true, be found elsewhere; but the Mussulman rules of warfare are by no means well known, nor is the 'Sempacherbrief' a familiar document.

The seventh chapter contains an interesting account of the views of Wyclif on the rights of heretics and infidels. Elsewhere the merits of the Civilians, as advisers of Elizabeth and James I upon international questions, receive their due meed of recognition, and the College of Advocates of Doctors Commons is mentioned with the respect which it well merited. But though M. Nys must have spent many an hour upon little consulted MSS. in the British Museum and the Record Office, as well as in similar depositories on the continent, he is no mere bookworm or antiquary, but has a firm grasp of the principles of his subject and a wide outlook over its history.

T. E. H.

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*An Introduction to the Study of Anglo-Muhammadan Law.* By Sir Roland Knyvet Wilson, Bart. London: W. Thacker & Co.; Calcutta: Thacker, Spink & Co.; Bombay: Thacker & Co., Lim. 1894. 8vo. vi and 151 pp. (*7s. 6d.*)

This work of about 150 pages is published merely as an introduction to a larger work on 'Anglo-Muhammadan Law' (in other words, on Muhammadan Law as administered by the Anglo-Indian Courts), and it must not, therefore, be expected to contain the same elements of instruction as if it were distinctly a legal treatise. Still, when an author offers to the public a 'brief outline' of an important branch of Jurisprudence, as the late Cambridge Reader does in his final chapter, he invites legal criticism of that part of his work. Sir R. K. Wilson has been a teacher of Muhammadan Law for many years, and we should have expected him to have avoided certain misleading statements which, it may be hoped, are only made through haste, and will not be reproduced in his forthcoming larger book. He tells us that where 'there is a daughter and no son, or a sister and no brother, the female takes half (or two or more together, two-thirds) of whatever is not otherwise disposed of, leaving the rest for the remoter male heirs, whoever they may happen to be;' but he probably knows very well that the statement should be confined to males related through males, for those related through females (except, under some circumstances, uterine brothers), would take nothing, and the daughter or sister (or daughters or sisters) would take the rest of the property by the 'return.' A subsequent statement that 'the rule of the "double share to the male" is also applied between the parents, where the case is such (there being no children) that they will inherit together,' abounds in error, for if there be a son's son or son's son's son (and no children) the father and mother will each take a sixth, and if there be two or more brothers or sisters (and no children or son's sons, &c.), they will 'drive the mother from a third to a sixth[1],'

[1] The quotation is from Sir William Jones's translation of Al Sirájiyyah, p. 14 in the original edition.

while the father will exclude them and will take the whole of the other five-sixths. The supposition (in the same sentence) that a mother may have been saved from having one-twelfth by an apprehension that it would make the division 'too complicated,' will excite the risible muscles of those who know what mighty fortresses of numbers are fearlessly assaulted by the arithmetical champions of Islam! The historical and quasi-historical portion of the little treatise is founded almost entirely on the works of other modern writers, and cannot therefore serve as an authority for the student, though it may have some interest for the *dilettante* Muhammadan lawyer. Sir William Muir serves as a reference for many of the statements, and it is touching to learn, on his authority, that the widow and daughters of a deceased Muhammadan owe their provision under the law of inheritance to the fact of the Prophet's having partaken of a lordly supper with a feast of fresh dates as a finish. Such is the simplicity of a primitive age! Can any one tell how many good dinners and how many bottles of champagne would be required to soften the heart of a modern legislator?

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*The Law of Trademarks, Tradename and Merchandise Marks, with chapters on Trade Secret and Trade Libel, and Statutes.* By D. M. Kerly. London: Sweet & Maxwell. 1894. 8vo. xlviii and 752 pp. (25*s.*)

Mr. Kerly's book is compact and exceedingly well printed. The fact that down to 1892 as many as 70,625 trade marks had been registered, and that the average addition per year is considerably over 5000, shows the importance of the subject-matter with which the book deals. The special points in the Act of 1883 are taken in order in successive chapters, with sections for each particular set of operative words, such as 'device,' 'brand,' 'ticket,' 'label,' 'fancy word,' 'passing off,' &c. There is a very full chapter on 'What marks may be registered as trade marks,' and the discussion of 'invented words' is valuable. Practitioners who are consulted as to registering Welsh words or Gaelic words in relation to flannel or whisky, will find the perils of utilizing such words clearly set out, in accordance with the decision in the Somatose case, when it was held that a fancy word, formed of the Greek σῶμα (body) and the ordinary affix 'ose,' was a 'descriptive' word, and consequently not permissible as a trade mark for a chemical food that claimed to be 'easily absorbed into the body.' If there is a little haziness in some of the paragraphs, it must be confessed that the anomalies in some of the judicial distinctions also involve some confusion. It is perhaps too much to hope for a set of consistent precedents, when questions come before Chancery and Common Law judges from so many differing points of view. The consequences of the decision in *Moet* v. *Pickering* are not very clearly expressed (358 pp.) in the words, 'The lien of a wharfinger for his charges in regard to goods deposited with him, including the costs he is put to by being made a defendant in a trade mark action, is not destroyed if the goods turn out to be spuriously marked, and although in some earlier cases the plaintiff was adjudged to have a lien upon the goods, subject to that of any wharfinger, or mortgagee, who had an earlier charge, and who was innocent in regard to the infringement, the Court of Appeal in the last case cited expressed considerable doubt whether such a lien could be supported.' It would be difficult for a reader to gather from this involved sentence that Fry J. had given costs to a plaintiff against the infringing defendant and a co-defendant who was wharfinger, postponing the lien of the wharfinger on the goods in store, until the plaintiff

recovered costs. The Appeal Court decided that '*the wharfingers were entitled to a prior lien*' to the plaintiff, and as the wharfingers had, in their plea, submitted to the direction of the Court, that they ought not to be saddled with costs. Six short sentences would have been more succinct than the long one. The author has been very diligent in the compendium of cases. The Leicester case, under the Merchandise Marks Act, in reference to the hosiery custom of calling certain goods 'natural wool' when they were made of 'little wool' and much cotton, is given from the daily newspaper report. The case of *Budd* v. *Lucas*, in which the Divisional Court held that in the sale of a cask of beer, 'barrel' is a trade description, is quoted to illustrate five or six different points. This indicates a careful examination of cases, though, by the bye, no comment is made on the fact that the Weights and Measures Act declares all contracts void, if measures of capacity not allowed in the Act are used. But this decision requires that, if used as a *trade description*, the disallowed measure must contain its full thirty-six gallons, thus reviving a discontinued measure of capacity. Some decisions only a few weeks old are fully noted. It may be that the author does not show the exactness and precision requisite for the analysis of intricate particulars—everyone cannot emulate the late Lord Justice Cotton—yet, on the other hand, he is well qualified in the arts of skilful generalization and accurate ingathering of data. A better book to 'start the train' in working trade mark cases could hardly be desired.

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*The Statutes of Practical Utility.* Being the Fifth Edition of 'Chitty's Statutes.' By J. M. Lely. Volume I, 'Act of Parliament' to 'Charities.' London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. La. 8vo.

It is our custom to note at the head of a review the number of pages in the book before us. To do this with the new edition of 'Chitty's Statutes' would be an arithmetical exercise, inasmuch as the paging is no longer continuous through each volume, but is now separate through each title. This is an improvement. For to have continuous paging throughout such a book of reference as 'Chitty' serves no useful purpose except that of collation. To have each title paged is useful, especially as we understand that each title may be procured separately. The volume of 'Chitty's Statutes' increases by leaps and bounds. It duplicates itself like the nails in a horse's shoes. It began in the year 1828 in two stout volumes. The second edition was not published in its entirety until 1854, and the third came out in 1865. For the fourth in 1880 Mr. Lely was responsible. That was in six volumes. Now, nearly fifteen years later, comes the fifth edition, which is to be in no less than twelve volumes. In effect, the size of the work is nearly doubled in fifteen years. But such are the energy and the industry of the editor, whose pen has covered a larger surface in the legal field than any other, that he promises his final volume by April or May, 1895. If he fulfils this promise, he will do well indeed. He will have built another monument of learned and laborious industry. And the name of Lely will be almost as well known to future generations of lawyers as is the name of Chitty. What adds very much to the labours of Mr. Lely and his confrères is that it is sometimes necessary for them to retain repeated enactments and parts of enactments for the due understanding of the existing law. The great value of their work is in the cross references. We do not value nearly so highly the notes which refer to some of the decisions upon the Acts. In this, the first volume, we are glad to note

one great improvement upon the fourth edition, which is the new title 'Bastardy.' The Acts upon this subject have hitherto been to be found under 'Poor' only. To conclude, Mr. Lely's work is as painstaking and thorough as he has accustomed lawyers to expect at his hands.

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*Mayne's Treatise on Damages.* Fifth Edition. By JOHN D. MAYNE and LUMLEY SMITH, Q.C., Judge of the Westminster County Court. London: Stevens & Haynes. 1894. 8vo. xliii and 642 pp.

IN the preface to the original edition of this standard work, published as long ago as 1856, the author observed that the number of cases in which the rules for ascertaining the measure of damages were also the only rules for ascertaining the existence of a right of action, and of cases in which no measure of damages could be stated at all, had 'made many parts of the present work resemble a treatise on the law of Nisi Prius rather than one exclusively appropriated to Damages.' There was much substance in this reflection, and it is because 'Mayne on Damages' is really as complete and useful a treatise on Nisi Prius as one volume of its size will contain, that after nearly forty years of existence it is now taking a new lease of life. In reality it treats of the whole law of Nisi Prius from the point of view of damages, and it would not be an easy task to write anything deserving to be called a book on Damages in any other way. There are many law-books: a certain proportion of them are good: and the general practitioner takes to some two or three of the good ones, not necessarily because they are the very best, but because he knows his way about them. One lawyer of great learning always turns in the first place, when brought up by the arising of a new point of law, to 'Williams on Executors.' Others have other favourites, and from the appearance of the present edition we might infer, if we did not know, that there are many men to whom Mr. Mayne's book is one of the necessary companions of their professional lives. From the fact that the present editors are the author and Judge Lumley Smith, we may further infer that to such persons the fifth edition will not be less useful than its predecessors. A study of the footnotes will reveal the fact that the activity of the Court of Appeal during the ten years that have elapsed since the publication of the fourth edition has effected a somewhat smaller proportion of substitution of new for old authorities than a constant reader of the Reports might have been tempted to expect. We are glad of it, for it shows that practically, in the opinion of two particularly learned and industrious commentators, the main principles of English law tend continually to undergo illustration rather than renovation, which is quite as it should be.

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*Company Law and Practice with Forms and Precedents.* By T. C. H. CHADWYCK HEALEY, Q.C., PERCY F. WHEELER, and CHARLES BURNEY. Third Edition. London: Sweet & Maxwell. 1894. Imp. 8vo. cxxiii and 1246 pp. (£2.)

THIS book is itself an admirable example of the co-operative principle of which it treats. In former editions it is well known to the profession and much appreciated, but the present edition will immensely enhance its reputation. *Μέγα βιβλίον μέγα κακόν* is for once not true. The method adopted is not that of Mr. Buckley, of annotating the Acts, nor of Mr. Palmer, of grouping the law around forms, nor of Mr. Manson, of an alphabetical digest. In what may be termed Part I we have a masterly

and exhaustive treatise on the general principles of Company Law, and none but those who, like the present writer, have tested the matter page by page and line by line, can adequately appreciate the vast labour which has been condensed into these first two hundred pages. Every sentence is the distilled essence of many authorities carefully weighed, sifted, and analyzed in the light of a not merely theoretical but thoroughly practical acquaintance with the subject. On one point, however—and we only allude to it because it is in these days a very important one—we feel constrained to question Mr. Chadwyck Healey's view, and that is the doubt he expresses as to the validity of debentures to bearer (p. 174) on the ground that there is no second contracting party within Lord Cottenham's ruling in *Squire* v. *Whitton*. 'Is the word "bearer,"' he asks, 'any sufficient description of a second contracting party? . . . The description of the parties to a contract should be such that their identity cannot fairly be disputed, and such description, it may be said, is not sufficiently supplied by the word "bearer" any more than it is in the case of a contract to sell land by the word "vendor."' We venture to think that the promise is to pay to any one who satisfies the character of 'bearer'—a springing or shifting contract similar to that of an advertised reward and condition fulfilled, and that the maxim 'Certum est quod certum reddi potest' applies. No doubt there might be troublesome points about consideration; and if the instrument is under seal, further difficulties arise. It would hardly do to say that the trouble of presenting the debenture for payment is the consideration.

The second part—more than half the book—is devoted to the now voluminous subject of Winding-up, and here we have the subject very conveniently grouped—case law, statute law, rules, orders, and forms all together—under leading headings, 'Committee of Inspection,' 'Proof of Debts,' and so on. We have dwelt on the law, but the forms and precedents are quite as striking a feature of the book. They are abundant and excellent, and evidently the ripe fruit of much experience. All the most recent cases are noted, and the indexes leave nothing to be desired. Taken all together, this is, in our opinion, the most complete and useful work yet issued on Company Law and Practice, and we shall be much surprised if it does not assume the leading position among books dealing with that subject.

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*Outlines of the Law of Torts.* By Richard Ringwood. Second Edition. London: Stevens & Haynes. 1894. 8vo. xli and 253 pp. (10*s.* 6*d.*)

The number of works on the subject of Torts, from the voluminous treatise down to the most elemental text-book, is very considerable. But that there is a demand for a clear and well-written work dealing with the Law of Torts concisely, yet comprehensively, is evidenced by the fact that Mr. Ringwood's book has reached a second edition. The author informed us in the preface to the first edition that certain lectures delivered by him before the students at the Law Institution formed the groundwork of the volume, and the clearness and symmetry of its arrangement bear evident traces of its origin. Since its first appearance in 1887 the question of Employers' Liability has been much discussed, but so far without any tangible result in statute form. The law, therefore, on this subject is still governed by the Act of 1880, which has been renewed from year to year from the date of its expiration in 1887, and most of the cases in which

points of difficulty under the Act have been judicially determined are referred to in the present work. The chapter on malicious injuries is new, and dealing as it does with many questions of great interest and importance, particularly at the present time, such as malicious inducements to a breach of contract or malicious injuries to a person's property or trade, is of especial value. A full account is given of the recent leading case in this branch of the Law of Torts, that of the *Mogul Steamship Co.* v. *McGregor Gow & Co.*, 23 Q. B. D. 598 and '92, A. C. 25. The short chapter on torts in respect of domestic relations is also new, and includes the law respecting seduction, which is perhaps too summarily dealt with. More also might have been said about the remedy by injunction and as to various breaches of duty on the part of public officers remediable by the prerogative writ of mandamus. The author, however, modestly professes to deal only with the outlines of torts, and the title is a very apposite one, for the sketch here given can be filled in by the student from such a storehouse of authorities as 'Addison on Torts,' while the numerous references to judicial decisions enables the practitioner, if necessary, to follow out into wider tracks the indications given in the text. There is a good table of cases, and a list of statutes referred to finds a place in the fairly full index. The work is an excellent one in most respects, and as a useful summary of the Law of Torts compares favourably with similar works, whether for students or practitioners.

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*The Law of Patents: with Acts, Rules, Forms and Precedents.* By Henry Cunynghame. London: William Clowes & Sons, Lim. 1894. Demy 8vo. lxxiv and 635 pp. (25*s.*)

The size of the average work on Patent Law shows clearly the difficulty of compressing within the limits of a moderate-sized volume a complete account of the subject of this book. Although the Law of Patents now depends chiefly on the Act of 1883, with a few short amending Acts, there are an immense number of judicial decisions, both of an earlier and a later date, which must be considered by any one who attempts to apply the Act to a particular case. A work on Patent Law must necessarily to a great extent consist of a digest of these cases, and much of its value depends on the clearness with which the facts in each case are stated. This condition is abundantly fulfilled by the work before us. The Table of Cases is practically complete, and the indication it contains of the subject-matter of most cases is a novelty which will commend itself to all. For some reason the Law Report references of many cases referred to, which are in the L. R. series, are omitted both in the Table of Cases and in the body of the book; this is to be regretted, as the fact of their being in the Law Reports would mark them out as likely to have some point of greater value than the ordinary R. P. C. cases. Few will be likely to differ from the opinion expressed by the author at the close of the Introduction that Patent agents, whose duties so much resemble those of solicitors, should have something corresponding to the solicitor's lien and the professional privileges as to their clients' secrets. Less attention than we should naturally have expected is bestowed on the somewhat important subjects of mortgages and licences, especially the former, and the consideration of the position and rights of the mortgagee and the licensee. The Patent Act of 1883, with the alterations due to subsequent amending Acts embodied in it, the Patent Rules of 1880 and 1892, the Law Officers' Rules, Official Forms, and the Patent Office Circular printed in extenso in the appendix, with forty-five pages devoted to a collection of common forms, make a useful addition to

the main body of the work. The author must be complimented on having succeeded in compressing a vast mass of case law into a volume of a very reasonable size without sacrificing clearness to brevity: he has put a practically complete account of English Patent Law into a handy form which will commend itself to professional men, for whom it was primarily written, while it will probably be acceptable to others, and will be of great assistance to many an intending patentee.

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*Key and Elphinstone's 'Precedents in Conveyancing.'* Fourth Edition. By THOMAS KEY and C. HERBERT BROWN, with assistance, which is acknowledged in the Preface, from Sir H. W. ELPHINSTONE and E. P. WOLSTENHOLME. Two Vols. London: Sweet & Maxwell, Lim. 8vo. lxxx and 1051, lxxx and 1078 pp. (4*l.* 4*s.*)

THIS edition brings up to date a work which is universally acknowledged to be one of the best of its kind, and one of first-rate usefulness to students and lawyers alike. The forms have always been distinguished for their style and practical utility, and are especially useful in the case of mortgages of building leases and public house property. The forms of and relating to conditions of sale are especially useful and comprehensive, and, in particular, we may mention the special conditions relating to building land. The book contains also, in addition to the more ordinary forms, useful precedents in connexion with patents, notices, and trading agreements and some serviceable miscellaneous forms, which, so far as we have been able to discover, are not contained in any other collection of precedents. The feature, however, of the new edition consists not so much of additions to the precedents as of the new matter introduced into the notes, many of which have been either wholly or in part re-written, so as to bring them well up to date, and are a mine of valuable information on conveyancing law. There are references throughout to the latest Acts and cases, and especial attention is directed to the Addenda and Corrigenda, which contain additional and substitutional references to many of the most recent decisions of 1894 and to the Acts of 1893 (passed after the book was partially printed), and, in particular, to the Trustee Act, the Married Women's Property Act, and the Conveyancing Act of that year. The preliminary notes to each group of precedents are useful and exhaustive, and good examples of the general notes, showing their practical nature and comprehensiveness, are contained in vol. 2 on pp. 23 and 54, on 'powers of sale,' and 'attornment clauses' in mortgages. The editors might, perhaps, have stated with advantage in the notes on insurance and repairing covenants in mortgages, in what cases it is advisable to insert such covenants in mortgage deeds. The vast amount of work that has evidently been expended on these notes has produced a most valuable and useful result, and should go far to procure for the book an even higher position than that to which it had previously attained.

A new edition (the fourth) has also been brought out of Elphinstone's 'Introduction to Conveyancing,' edited by Sir H. W. Elphinstone and James W. Clark (London: Sweet & Maxwell, Lim., 1894, 8vo, xxxii and 551 pp. 14*s.*). This work is well known to the public, and needs no recommendation. It is intended for students who have first acquired an elementary knowledge of real property law, and can very usefully and in a very practical manner be studied in connexion with the precedents above mentioned, to which there are references throughout. The object of the book is to offer

a gradual course of instruction, and a preliminary note indicates what parts may be left out on the first perusal. The book has been brought well up to date. There are references to the latest decisions, and it is adapted as far as possible to the scheme of lectures at present attended by students for the Bar examination.

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*Ruling Cases:* arranged, annotated, and edited by ROBERT CAMPBELL. With American Notes, by IRVING BROWNE. Vol. I. Abandonment—Action. London: Stevens & Sons, Lim. Boston, Mass.: The Boston Book Co. La. 8vo. xxix and 829 pp. (25*s.* net.)

THE object of this handsome volume, which is the first of what will no doubt be a long series, is, according to the Preface, to supply the practitioner with English Case Law in a handy form. The Ruling Cases are to inform him as to the principles, and the Notes to show in detail how the principles have been applied or modified. American notes are appended to each of the English Ruling Cases, and notes thereon, and the object of these American notes is to point out concisely the agreement or disagreement of the American case law with the English, and generally to commend the work to the American as well as the English practitioner. The objects of the series, it will be seen, are very extensive. The English Ruling Cases seem generally to have been well and carefully chosen, and a great amount of work has been expended. The series will no doubt be of great service to men without large libraries; nevertheless, we are of opinion that so much has been aimed at as to make the result fall short of completeness in execution, and to impair to some extent its practical utility. In the English 'Ruling Cases' the judgments are sometimes incompletely set out for the purpose of saving space. There can be no doubt that space is gained by leaving out such passages as the editors deem unnecessary; but, where the whole object is to establish the grounds on which the judges have settled the law, this method is in our opinion wrong, and tends to produce incomplete and unscholarly results. *Lumley* v. *Gye*, for example, is ruthlessly cut down, and Sir John Coleridge's dissenting judgment omitted, so that the history of the law is quite obscured. The notes, which are intended, as before stated, to show the practical application of the leading principles, do not seem to us to be, as a rule, sufficiently detailed and thorough. To compare the results of the work in this volume with similar results in Smith's Leading Cases or White and Tudor's Leading Cases is, to our minds, the best proof of this; and the main objects of the present volume are the same as those of the older works. Again, the present work is stated to be on the lines of Saunders' Reports (or rather Williams on Saunders), and again we can only say that a comparison between the two, as regards the completeness of working out in detail the application of the principles, is distinctly unfavourable to the 'Ruling Cases.' Great accuracy and care are shown in the preparation of the notes, so far as they go, but we do not understand on what system or for what object the case of *Leake* v. *Robinson*, which is really a decision on the rule of equity, independent of statutes, against perpetuities, comes to be cited on p. 518 among the notes under the heading of 'Accumulation.'

Moreover the English Ruling Cases include cases and notes on the practice of the English Courts, and as this can only be intended for purposes of practical utility, we must again doubt whether the desired result has been attained. Leading principles, such as there are, on questions of practice can be usefully dwelt upon only in respect of their application, which varies

so much according to the different circumstances of each case in which they are applied as almost to do away with the idea of any fixed leading principles. Taking, for instance, the heading of 'Abatement,' it is certainly difficult to see how, with the mere references to changes made by the Judicature Acts, and nothing more, the notes can be of much assistance in actual practice. Moreover, from an English point of view we fail to see the usefulness of reviving old terms now obsolete (see the note on p. 156 as to this). We should be disposed to doubt whether English practice cases and notes could be of extensive utility in a work intended for the American as well as the English market. Of this, however, we must presume the American editor to be the best judge. With regard to the American notes, we do not see, if the principles of the American decisions are to be properly understood and made use of to any extent in England, why the most important of such decisions have not been admitted on the same footing as the English ones. The American notes, as they stand, appear to us not likely to help English practitioners except for the purpose of multiplying references which English Courts will probably discourage. For the American practitioner they would seem (though here again we cannot confidently put our judgment against the American editor's) not to be full enough. The extremely important decision of the Supreme Court of the U. S. in the *Nitro-glycerine* case is dismissed in a line and a half. Under the same head, 'Accident,' we find no reference to the recent and not unimportant English case of *Stanley* v. *Powell*. As regards externals, the book is got up in a very handsome manner, and there is a useful and well-arranged index of both English and American cases cited.

To sum up, the actual work in this volume seems to us most deserving of success so far as it goes, but we think that it fails to attain to a first-rate level of merit through aiming at too many kinds of merit at once. Full practical notes on the scale of Smith's Leading Cases or Williams's Saunders are one thing, and the exposition of principles to be found in a good text-book, or better still in the occasional great judgments which review the principles of a subject, is another thing. Practical notes for an English lawyer, again, are one thing, and practical notes for an American lawyer are another thing. The qualities required for excellence in these several kinds of work are obviously not the same, and it is not obvious that they are compatible in the same book. Experience will show whether the editors of 'Ruling Cases' have achieved the task of combining them. We will not say offhand that they have not; but we are not prepared to say, in anticipation of experience, that they have.

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We have also received:—

*Notes on Land Transfer in various countries.* By C. Fortescue-Brickdale. London: Horace Cox. 8vo. iv and 66 pp. (1*s*.)—This pamphlet contains a store of facts which should be consulted and weighed by every one interested in the problem of simplifying the transfer of land. One of the most important points is that in the Australian colonies titles were by no means short and simple before the Torrens system was introduced, although one of the stock arguments used at home against registration of titles is that it may do very well for a new country but would not work in an old one. We may add that the system has been at work for several years in Trinidad, where English real property law had been superposed on old Spanish titles. No trouble has arisen from it save that (under extremely peculiar conditions now best forgotten) claims for registration were to some

extent used as an irregular substitute for actions of ejectment to determine questions in dispute, or sometimes, it was said, for purposes of mere delay and embarrassment. Such abuses can easily be prevented if administrative and judicial officers do their duty. In the United States it seems probable that Massachusetts will adopt the system before long. If it succeeds in one or two States, the others are pretty sure to follow.

*The Law and Lawyers of Pickwick.* A Lecture. By FRANK LOCKWOOD. London: The Roxburghe Press. 12mo. 108 pp. (Cloth 1*s.* 6*d.*, Manilla 1*s.*, net.)—This is a mighty pleasant legal diversion. *Bardell* v. *Pickwick* is one of the best known leading cases of English fiction, and Mr. Lockwood is its best possible annotator. Note, learned reader, Mr. Lockwood's reasons for thinking that Mr. Pickwick would have fared even worse under the modern law of evidence, when Serjeant Buzfuz would have had the materials for a crushing cross-examination. The Roxburghe Press particularly wants to know how people like the title-page printed in green ink. To be frank, we love a judicious mixture of red and black after the sixteenth or seventeenth-century manner, but green does not captivate us.

*A set of Test Questions on various text-books, embracing all the subjects at the Solicitors' Final Examination.* By JOHN INDERMAUR and CHARLES THWAITES. London: Geo. Barber. 1894. 8vo. 143 pp.

*An Index of all reported cases decided in the English Courts during the period covered by the Revised Reports.* Vols. 1–15. (1785–1816.) London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1894. La. 8vo. xiv and 313 pp.

*The Opinions of Grotius.* By D. P. DE BRUYN. London: Stevens & Haynes. 1894. 8vo. xlviii and 668 pp.

*Inebriety or Narcomania.* By NORMAN KERR. Third Edition. London: H. K. Lewis, 136 Gower Street. 1890. 8vo. xxxix and 780 pp. (21*s.*)

*A Practical Treatise on the Criminal Law of Scotland.* By J. H. A. MACDONALD. Third Edition. By the Author and N. D. MACDONALD. Edinburgh: W. Green & Sons. 1894. 8vo. xv and 652 pp. (31*s.* 6*d.*)

*Banking Law, with Forms.* By WILLIAM WALLACE and ALLAN MCNEIL. Edinburgh: W. Green & Sons. 1894. 8vo. xxxii and 433 pp.

*A Manual of the Study of Documents to establish the individual Character of Handwriting.* By PERSIFOR FRAZER. Illustrated. Philadelphia: J. B. Lippincott Co. 1894. 8vo. xi and 218 pp.

*The Law relating to losses under a Policy of Marine Insurance.* By C. R. TYSER. London: Stevens & Sons, Lim. 1894. 8vo. xvii and 232 pp. (10*s.* 6*d.*)

*A Handy Guide to the Licensing Acts.* By H. W. LATHAM. London: Stevens & Sons, Lim. 1894. 8vo. xxii and 149 pp. (5*s.*)

*The Finance Act, 1884, so far as it relates to the Death Duties and the new Estate Duty.* With Notes and Forms. By J. E. HARMAN. London: Stevens & Sons, Lim. 1894. 8vo. xi and 114 pp. (5*s.*)

*A Guide to the new Death Duty.* By EVELYN FREETH. London: Stevens & Sons, Lim. 1894. 8vo. vi and 187 pp. (7*s.* 6*d.*)

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*The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.*

# INDEX

TO THE

# LAW QUARTERLY REVIEW

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[Names in CAPITALS are of contributors. The titles of books reviewed are printed in *italics*. Books merely acknowledged, without comment, are not indexed. Titles of Notes are followed by (*n.*).]

# TABLE OF CASES,

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[This Table includes only modern cases specially noted or discussed.]

Oxford

HORACE HART, PRINTER TO THE UNIVERSITY